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IN THE

Supreme Court of the United States

No.

DAVANNE REALTY COMPANY, VINMAN COMPANY, NEWARK JERSEY COMPANY, CLAYTON HOLDING COMPANY, MONNA, INC., all of the foregoing being corporations of the State of New Jersey; PHILIP MANDELBAUM and ELLA MANDELBAUM, his wife; and ROBERT GOLDBERG and DIANE GOLDBERG, his wife,

Petitioners,

vs.

MAYOR and TOWNSHIP COMMITTEE OF THE TOWNSHIP OF MONTVILLE,

Respondent,

and

COMMITTEE FOR THE PRESERVATION OF NORTHERN MONTVILLE, INC.,

Respondent-Intervenor.

PETITION FOR A WRIT OF CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

No.

DAVANNE REALTY COMPANY, VINMAN COMPANY, NEWARK JERSEY COMPANY, CLAYTON HOLDING COMPANY, MONNA, INC., all of the foregoing being corporations of the State of New Jersey; PHILIP MANDELBAUM and ELLA MANDELBAUM, his wife; and ROBERT GOLDBERG and DIANE GOLDBERG, his wife,

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MAYOR and TOWNSHIP COMMITTEE OF THE TOWNSHIP OF MONTVILLE,

Respondent,

and

COMMITTEE FOR THE PRESERVATION OF NORTHERN MONTVILLE, INC.,

Respondent-Intervenor.

PETITION FOR A WRIT OF CERTIORARI

The petitioners, Davanne Realty Company, *et als.*, respectfully pray that a Writ of Certiorari issue to review the Judgment of the Supreme Court of New Jersey and the Opinion and Judgment of the Appellate Division of the Superior Court of New Jersey adopted thereby and entered in this proceeding on May 1, 1979.

OPINIONS BELOW

The Supreme Court of New Jersey denied Petitioners' application for certiorari without opinion. The Opinion of the Appellate Division of the Superior Court of New Jersey, dated February 5, 1979, is appended at Pa1. The Opinion of the Law Division of the Superior Court of New Jersey, dated January 9, 1976, is appended at Pa4.

JURISDICTION

The Judgment of the Supreme Court of New Jersey was entered on May 1, 1979. (A copy of the Judgment is appended as Pa30). By this Judgment the Court denied petitioners application for certiorari and left standing the Opinion and Judgment of the Appellate Division aforesaid. The Appellate Division's determination permitted the Law Division's Order of February 25, 1976 and Judgment of May 10, 1976 to remain in full force and effect without modification. (The former is reproduced as Pa31 and the latter as Pa34.)

An application for an extension of the time in which to file this petition was filed on or about July 19, 1979, within the ninety day period from May 1, 1979, permitted for the filing of this petition. On July 24, 1979, the Honorable William J. Brennan executed an Order Extending Time to File For Writ Of Certiorari to and including September 13, 1979. This petition is filed within the period provided by said Order.

The Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Did the re-zoning of petitioners lands rendering them "virtually valueless" constitute a "taking" without just compensation in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States?

2. Was the harm to petitioners as a result of the re-zoning so unduly harsh as to deprive them of substantive due process of law in violation of the Fourteenth Amendment in view of the doubtful public purposes served and the availability of more reasonable means to implement the public policies?

STATEMENT OF THE CASE

On September 3, 1974, petitioners duly filed their Complaint in this matter in the Law Division of the Superior Court of New Jersey. The Complaint alleged that the re-zoning of a large tract of 586 acres owned by petitioners by the Township of Montville, Morris County, New Jersey, was arbitrary and unreasonable and, among other transgressions of law, constituted a taking without just compensation in violation of their rights as guaranteed under the Fifth and Fourteenth Amendment of the United States Constitution. This position was articulated in the pretrial order and argued in petitioners' briefs below including their brief on appeal and their petition for certification to the New Jersey Supreme Court.

The act complained of was the passage of a zoning ordinance by the Township Committee of the Township of Montville which removed petitioners' property from the A-2 zone and placed it in a newly created and drastically more restrictive A-1 zone. The minimum lot size was in-

creased from 45,000 square feet (hereafter described as one acre, although one acre is more accurately 43,560 square feet) to 120,000 square feet (called for convenience three acres) rendering the tract unusable as zoned. Although petitioners voiced their objections to the destructive effect of this requirement by petition in May of 1974, and at the public hearing in July of that year, the Township Committee enacted the ordinance on July 18, 1974.

On November 27, 1974, the Committee for the Preservation of Northern Montville (hereinafter CPNM) moved to intervene as a party defendant, which motion was granted. Petitioners moved to appeal the order in the Appellate Division, which motion was denied on February 7, 1975.

At the pretrial conference on March 21, 1975, the Court ordered that the proceedings be bifurcated to deal separately with issues pertaining to the particular site as Phase I and the challenge to Montville's zoning under *Southern Burlington County NAACP v. Township of Mt. Laurel*, 67 N.J. 151, 336 A.2d 713 (1975) as Phase II.

Phase I of the trial, concerned primarily with confiscatory and comprehensive planning aspects of the amended zoning ordinance, commenced on September 26, 1975. The trial proceedings spanned nineteen days from September 26, 1975 to November 13, 1975, and are recorded in 2,108 pages of transcript. By Order dated February 25, 1976, the Court invalidated certain technical aspects of the cluster provision of the A-1 zoning, but indicated that the ordinance could be corrected if an appropriate amendment were enacted within 90 days.

On April 14, 1976, the Court heard argument on Phase II of the matter. On May 10, 1976, the Court, finding that the requirements announced in *Mt. Laurel* applied to

Montville, ordered that the Township complete its master plan study and enact implementing ordinances to comply with the *Mt. Laurel* decision, *supra*, by January 31, 1977. Montville did not appeal this determination by the trial court.

Petitioners filed a Notice of Appeal in the Appellate Division of the Superior Court of New Jersey on May 21, 1976. They appealed from the Order of February 25, 1976 which generally sustained the A-1 (three acre density) zone and from those aspects of the Judgment of May 10, 1976 that failed to require Montville to fulfill its fair share of the needs for low and moderate income housing in the region.

Initially, the Appellate Division dismissed the appeal upon the motion of the defendants. Pursuant to petitioners' application, however, the New Jersey Supreme Court reinstated the matter remanding it to the appellate court. In their brief and argument on appeal, petitioners continued to press their claim that the zoning deprived them of their rights to substantive due process under the United States Constitution. On February 5, 1979, the Appellate Division issued its *per curiam* Opinion, affirming the determination of the trial court.

On February 21, 1979, within the time period provided by law, petitioners filed a Petition for Certification to the New Jersey Supreme Court. In their petition, they posed a single question:

> The issue, now before the court for the first time with a clear, established record, is simple: Is an ordinance which imposes extreme lot size requirements, effectively prohibiting development for one fifth of a sprawling township, sustainable under the new Municipal Land Use Law, the United States Constitution and the Constitution of the State of New Jersey.

On May 1, 1979, petitioners' Petition for Certification to the New Jersey Supreme Court was denied without opinion. On July 19, 1979, within the period permitted by the rules, petitioners made application to the United States Supreme Court, addressed to the Honorable William J. Brennan, Jr., for an extension of time to file this Petition. On July 24, 1979, Justice Brennan executed an Order Extending Time to File Petition for Writ of Certiorari to and including September 13, 1979.

STATEMENT OF FACTS

Petitioners own 586 acres of land on the A-1 zone in Montville Township. In 1971, under the original one acre zoning prevailing prior to the adoption of the three acre zoning complained of in this litigation, petitioners obtained preliminary approval for a subdivision consisting of ninety lots on part of their land entitled "Mountainview Estates" (T14-2, 9/26/75). David Mandelbaum, appearing for the petitioners, testified to the extensive difficulties in marketing the one acre lot subdivision, describing newspaper advertising in *The Newark Star-Ledger* and *The New York Times*, listing with an active broker in Montville and reduction of the asking price to $3,000.00 a lot (*Id.*, T18-10 to 19-25). He emphasized the practical limitations presented by the one acre zoning much less the extreme disability imposed on the tract by three acre zoning (*Id.*, T19-19).

On July 18, 1974, however, the Township, in the words of its municipal planner, Robert J. O'Grady of Robert Catlin Associates, initiated "a very significant departure" from its zoning policy (Dep., T22-1). It reduced to an unprecedented low density the uses permitted in four

square miles of lands in northern Montville, and did so without any review of its master plan or of its overall zoning ordinances (*Id.*, T118-1).

The new ordinance (referred to as the "A-1 Ordinance") reduced the permissible density of development on petitioners' lands and much of northern Montville by approximately two-thirds. In the area west of Boonton Avenue, it reduced the permissible density by one-third (80,000 square-foot minimum lot size to 120,000 square-foot minimum lot).

The A-1 Ordinance provided a "cluster" alternative, if reduction to one acre lots, a very large size, can be considered "cluster." This permitted construction of single family detached dwellings on one acre lots as long as approximately two acres (for each one acre) of the most usable land were turned over to the Township. Because the trial court found this provision to be unreasonable, not as to the density but as to other features of the original ordinance, it has been revised to provide that cluster be allowed on seven acre minimum tracts; that the density be greater than that which could be achieved with 120,000 square foot lots; that the minimum lot size be 45,000 square feet, and that the remaining land either be dedicated as "undeveloped open space" or "conservation of environmentally sensitive features" or be utilized for school or recreational uses. This revised A-1 ordinance only authorizes "cluster" if "mutually agreeable" to the developer and the Township Planning Board and provides no standards to guide the Planning Board in giving its consent.

Consequently, where in 1975, petitioners had been faced with the great difficulties imposed by one acre zoning under the old ordinance, petitioners were now confronted with requirements three times more restrictive, limitations so drastic as to remove any vestige of doubt regarding potential developability.

At trial, one of New Jersey's most widely respected civil engineers, John Aurnhammer, testified to an itemized analysis of land development costs which he prepared with respect to petitioners' property (T29-2 *et seq.*, 10/2/75). According to Aurnhammer, the development cost per lot under the three acre zoning was approximately $25,000 (exclusive of the cost of the land and the attendant indispensable carrying charges) (*Id.*, T35-1). Even with the use of the so-called cluster provision, costs would be reduced by only about $3,000 per lot (*Id.*, T35-12).

Aurnhammer, from his experience as an engineer for numerous developers and John Lasser, an expert real estate appraisor, both testified in detail to the zoning requirements as the cause of these excessive costs which each concluded would render development for single family homes, using either alternative, impossible under current market conditions.

Based on the Aurnhammer cost analysis, Lasser demonstrated on the record of all sales in the Township during the most recent three years, that the market for homes in the price range required by the excessive development costs *for the entire Township* would be seven or eight homes per year on the average. "Based upon my research and my estimates of the market," Lasser testified, "it's my opinion that the property is virtually valueless with this kind of zoning because of the unusual development costs that are necessary for the site" (T26-14, 10/2/75).

Mary Winder, a planner, testified to examining the records at Township Hall. She found no housing developments at a three acre density anywhere in the Township, only one house constructed on three acres since 1965, and a total of only five houses built on three acre lots since World War II (T135-11, 10/1/75).

Defendants did not seriously challenge the cost analyses by cross-examination, or the conclusions drawn from them. No testimony was introduced by either defendant on the issue of feasibility to refute this testimony other than a general statement by O'Grady, devoid of any supporting evidence or data, that he believed some development was feasible.

In addition to the economic analysis just described, petitioners presented evidence demonstrating that the three acre zoning was derived and accepted from two sources, neither of which provided any rational basis for it.

Originally, a three acre zoning restriction was proposed by the intervenor, CPNM, a group of residents primarily living in and around Lake Valhalla, a mile or two south of petitioners' property (T589-3, 10/23/75). Its principal concern was the protection of the home environment around the lake. The stated goal of its proposal, as the testimony of CPNM president Hallie Connolly showed, was to halt development in the area in order to provide the Township with an opportunity to make studies and surveys. In making its recommendation, the Committee was fully aware that development of a subdivision with the three acre lots required by their proposal was, in Connolly's words, "ridiculous." Connolly testified that she did not anticipate that the suggestion for an "interim ordinance" would be translated, as it was, into a permanent three acre requirement effectively banning all new construction (T50-15, 11/12/75).

The second source for establishing the three acre zoning was a telephone conversation between the Township planner and the State geologist, Joseph W. Miller, Jr. Township Planner O'Grady had called him and described the northern Montville area in geological terms as Pre-

cambrian Gneiss. (Much of northern New Jersey is on lands once covered by a glacier. Consequently, these lands, embracing northern Montville and tens of thousands of acres extending far beyond the borders of the State, are underlaid by a gneiss rock formed in precambrian times). Miller told O'Grady then, and repeated at trial, that this Precambrian gneiss contained within it a moderate supply of water that could support from the land itself without resort to the Township's water supply a population of only approximately two hundred families for each square mile (T50-21 to 54-7, 10/29/75). This translates to approximately three acre density [there being 640 acres to a square mile]. Miller referred only to water supply and he made no pretense to any expertise in sanitary waste disposal. Thus, limiting the use of the site to the extremely low density population that could be supported by the on-site water supply was the genesis of O'Grady's proposal for upgrading the applicable density requirements on petitioners' land from one to three acres.

Even at the time of deposition, long after his recommendations were embodied in the local ordinance, O'Grady still believed that petitioners' tract was dependent on on-site water derived from the underlying precambrian gneiss rock. It was not until cross-examination at trial that he finally recognized that the municipal water system extends into this very A-1 Zone (T134-23 and 135-20, 10/16/75) and was and is available within one-half mile of petitioners' site. Petitioners' engineer testified without contradiction to the feasibility of utilizing the Township's water supply. The supply is currently only at one-third of capacity, so it is more than sufficient (T178-24, 10/30/75). The trial court, despite its conclusions, acknowledged that municipal water was available on site. Yet, the initial ground and a principal reason cited to justify the extreme low density was the opinion of the State geologist as repeated by

O'Grady which assumed total dependency on on-site well water.

O'Grady articulated other reasons, drawn together after the original determination, for large lot, low density zoning. He assumed that development would require septic systems (Dep. T60-18 to 62-13). At deposition he stated he never gave any thought to any other alternative method of sanitary sewer disposal (*Id.*). He assumed without making any inquiry that the Montville Utility Authority (hereinafter, MUA) would not be extending sewer facilities into northern Montville (*Id.*, 61-15; T423-12, 10/22/75). At his deposition, Carl E. Denzler, the Authority's engineer, described plans pending before the New Jersey Department of Environmental Protection and grant applications to the Federal government and State of New Jersey which would extend the interceptor sewer system in northern Montville around Lake Valhalla (Dep. T56-16). These proposed extension lines were delineated by Denzler on Exhibit P-10. The MUA was actively pursuing the alternative. Yet, the Township officials confined their thinking to a type of zoning that would compel the use of septic systems and preclude any other system of waste disposal. This was done at a time when the Township's own health ordinance, apparently recognizing the septic problem in Montville, mandated the use of a central sanitary sewer system for subdivisons of twenty lots or more.

At trial, petitioners presented expert engineering testimony and exhibits on the use of a package-treatment spray irrigation facility which would be feasible for a more dense form of development (T155-25, 10/1/75). This example, posed as a practical alternative to spread zoning on large lots, called for a more concentrated residential development of townhouses, with dedication in perpetuity of other parts of the tract in its undeveloped state. Much trial time

was consumed on the merits, strengths and weaknesses (by way of defense) of this alternative. It was presented in support of the vitally important consideration that extreme low density zoning mandates septic systems and precludes every other form of sanitary disposal.

When asked at deposition whether the low density three acre zoning would be warranted if development were not dependent on well water and septic systems, Township planner O'Grady admitted that he would have reached a different conclusion as to the lot size requirement. Similarly, when asked his view if the development were served by municipal water, Miller replied that if that were the case the three acre lot size no longer applied. In short, the principal bases for three acre lots were false assumptions.

Although the justification for the extreme large lot zoning had its genesis in the presumed unavailability of municipal water and then the dependency on septic systems, O'Grady sought further sustenance on three other grounds: existence of some steep slopes, soil conditions, and accessibility to municipal facilities. Petitioners will briefly discuss each of these rationales as none justifies the penalty inflicted on petitioners of having their property zoned into disuse.

With respect to the slopes, O'Grady stated that his concern began with slopes of 15% or greater (T105-18 to 107-3, 10/16/75). CPNM witness Connolly, calculated that 11.05% of the land had a slope of 15% to 25% (described as "moderately steep" (T8-7, 11/12/75), and an additional 16.41% had slopes in excess of 25% (described as "steep," *Id.*, T8-10). According to defendant's own witness, 72.54% of the land area on petitioners' tract was characterized as having only gentle or moderate grades. (*See* Exhibit DI-8 at 63, T127-3, 10/16/75).

No one suggested that lands with grades in excess of 15% were unbuildable (T189-8, 10/16/75), rather it was felt that development on the steeper slopes and certainly the steepest slopes was more expensive and should be avoided (*Id.*). If the Township's concern were to regulate or even prohibit construction on steep slopes it might have done so. Montville Mayor Frederick E. Eckhardt admitted that a slope ordinance was never considered (T443-1, 10/22/75).

With no grade problem on three quarters of petitioners' tract, with no effort to tailor the use of lands with steep slopes to the problems presented, Montville chose instead to enact excessively severe stop-development zoning restrictions for an area of four square miles.

As to soil conditions, O'Grady prepared and the parties stipulated in evidence a series of maps showing the prevalence of certain soil characteristics. On cross-examination, O'Grady readily acknowledged that "severe conditions" prevailed throughout the entire Township (T197-15, 10/16/75). In fact, of the land in Morris County, 56.8% or some 120,000 acres was classified as having severe limitations for construction of light buildings with basements (single family homes, town houses, garden-type construction). O'Grady also admitted that soil restrictions were less than the definitive prohibiting factor originally put forward by the Township. Rather, "severe", according to O'Grady, on cross-examination meant "a warning signal that there are going to be difficulties in developing certain lands and that in developing them, we should take the necessary precautions or steps to overcome that severity" (T189-12 to 189-19, 10/16/75). Nothing in the record

related the term "severe" to low density, extreme large lot zoning as an exercise of the police power.

O'Grady further testified that in mapping the areas with "severe limitations" he did not distinguish between those that "are of a public concern versus those that are of a private concern". He mixed them together (T191-15, 10/16/75). Time and time again on cross-examination, counsel asked the Planner to state the specific characteristics which he claimed were more prevalent in northern Montville and supported his "soils" justification for low density zoning (T191-10; 202-24; 207-1, 10/16/75). Finally, the following was elicited (*Id.* T206-13):

> "Now I want to know what it is about the soils that exist in such high degree in North Montville to support a distinction of three acre zoning as against one-half zoning elsewhere."

Opposing counsel interjected (*Id.*, T206-17):

> "He answered that 17 times, that it is not just soil. It's other factors."

O'Grady was simply unable to provide any support for the glib statement originally provided the Planning Board that soil conditions justified low density zoning.

As a final make-weight justification, O'Grady suggested that the three acre stop-all-development zoning was needed because northern Montville is remote from the police station and public schools and the roads are narrow and winding. Ironically, the overriding planning consideration affecting northern Montville is Interstate I-287 which passes through Montville within three miles of the A-1 Zone, and when completed will connect with the New York Thruway as part of the national interstate highway system (T224-12, 10/16/75). Within two miles of the A-1 Zone

are commuter railroad stations at Towaco (*Id.*, T223-20) and in Boonton (*Id.*, T223-23 to 224-1). From northern Montville it is less than thirty miles to New York City, Newark and Paterson. Any suggestion of remoteness belies the facts.

Much of the support for non-development zoning emanated from the residents of the Lake Valhalla section immediately south of the A-1 Zone. This area has been one of the fastest growing sections of the Township. Parts of it are zoned to anticipate non-residential growth. Immediately east of the A-1 Zone in northern Montville is one of the Township's industrial areas, classified D-1, with another immediately to the west of the A-1 Zone. Boonton Avenue, designated in the master plan as a "Major Road", County Road 511, transects the westerly portion of the A-1 Zone in a north-south direction and Stoney Bridge Road does the same about a mile and one-half to the east, and although needing improvement, this road serves the easterly portion of the area. In sum, while road improvements unquestionably will be necessary as northern Montville develops, they hardly warrant imposing a building ban on the entire four square mile area.

The CPNM sought to supplement the Township's reasons for large lot zoning with various environmental arguments. Little was added to the slope and soil contentions previously discussed. Essentially, the approach was that development, any development, increases the possibility of run-off, non-point pollution and flooding and that the people already in residence around Lake Valhalla might be subject to significant development in the four square miles of northern Montville. While petitioners anticipate the necessity of showing at the time of subdivision or site plan approval that reasonable standards as to drainage, protec-

tion against erosion and pollution must be met, this hardly calls for the drastic solution proposed here: stopping all development in the area and rendering petitioners' land economically useless. Rather, New Jersey's Municipal Land Use Law makes ample provision for this type of protection as part of subdivision and site plan review (N.J.S. 40:55D-38 and 39). It cannot be used as it is here as a threshold prohibition depriving an applicant of the right to show by proper engineering and design techniques that these concerns can be satisfied.

REASONS FOR GRANTING THE WRIT

The total destruction of the economic worth of petitioners' property for purposes of doubtful public benefit which could be effectively achieved by more temperate and reasonable means deprives petitioners of their property without just compensation in violation of the Fifth and Fourteenth Amendments and in violation of their Fourteenth Amendment right to due process of law.

Petitioners come to this Court because they find themselves losing the use and benefit of a substantial amount of real property as the result of actions by a Township that appear on their face to be patently impermissible under the decisions of the Court. As discussed in the "Statement of Facts," *supra*, the Township's three acre zoning renders petitioners' land economically undevelopable. The only announced public purposes for the zoning, however, do not even remotely mandate the approach taken by the Township or the unduly harsh result with respect to petitioners.

In short, the Township planner was concerned that well water under the land could only support the light population density that such zoning would ensure. He failed to realize, however, that an enormous supply of off-site water was available only one-half mile away. He had assumed in his zoning recommendation that septic systems would be utilized, but was unaware that the Montville Utility Authority was presently developing an extension of their sewer lines into the area even without the impetus that would be created by building on the land. Nor had he considered the use of a package-treatment spray system appropriate for locations where septic systems are not desirable. His subsequent medley of additional reasons for the zoning—slopes, soil and accessibility

to public facilities—were even less credible as detailed in the "Statement of Facts."

This was not an instance where the Township's reasons for its restrictions were founded on broad considerations relating to the quality of life or the preservation of a desirable aesthetic character of a community, *see New Orleans v. Dukes*, 427 U.S. 297 (1976); *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974). Indeed, the CPNM found it necessary to intervene in the litigation as a party so that its more general environmental viewpoint might be taken into account. It soon found itself, however, either parroting the bogus notions of the Township planner or maintaining that any development at all might be detrimental as a potential cause of pollution or drainage problems. As noted, *supra*. New Jersey does have specific legislation that controls development in order to ensure that these kinds of environmental abuses will not occur.

The Fifth Amendment to the Constitution contains the injunction "nor shall private property be taken for public use, without just compensation." Petitioners contend that the Township's rezoning of their property constitutes a taking for purposes of the Fifth Amendment.

This Court has long regarded government regulation that works a sufficiently onerous burden on a property owner as constituting a taking which constitutionally requires compensation. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). In considering whether the governmental limitations rise to the level of a taking, no set formula has been adopted although a comparison of values before and after is relevant. *Hadacheck v. Sebastian*, 239 U.S. 394 (1915). As Justice Holmes wrote for the Court in *Pennsylvania Coal*, *supra* at 413, the police power "must have its limits or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution."

Petitioners contend that in the case under review any value test must result in the finding of a taking. The record below clearly establishes that their land has been rendered "virtually valueless." *See* "Statement of Facts," *supra*, at 8-9. Petitioners are not bemoaning their inability to choose the most beneficial use; they are challenging regulations that render any permitted use economically disastrous and unthinkable.

The Court has indicated, however, that it will make a further inquiry beyond the bare question of value. This next consideration will be a determination of whether the public encroachment upon private interests constitutes a reasonable exercise of the police power. The classic and widely cited statement of this rule is drawn from *Lawton v. Steele*, 152 U.S. 133, 137 (1894):

> To justify the state . . . interposing its authority in behalf of the public, it must appear—First, that the interests of the public . . . require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.

Observing that even the time honored *Lawton* rule cannot be applied "with strict precision," the Court reaffirmed its adherence to it in *Goldblatt v. Town of Hempstead, New York*, 369 U.S. 590, 594-95 (1962). Petitioners submit that upon the trial of this matter, they have plainly met their burden of establishing the unreasonableness of the subject zoning regulation under the *Lawton* standard. *Bibb v. Navajo Freight Lines*, 359 U.S. 520 (1959).

First, the facts in evidence not only fail to show that the interests of the public do not require the interference with petitioners' property, they manifestly demonstrate the contrary. The Township's justifications for this police power exercise—lack of water, objections to septic sys-

tems, moderately steep slopes on one-third of the land, soil conditions that would increase construction costs and accessibility to public facilities (trains, schools, firehouse, etc.)—are totally without merit. Petitioners do not question the Township's legitimate interest in ensuring that its residents have adequate water or even in deciding that they should not use septic systems. Its "stop development" approach, however, uses an atomic bomb to knock down a footbridge. The concern about slopes and soil seems still more obscure in this context. These are truly only construction impediments which exact a cost from the developer and are already subject to strict governmental supervision and approval under existing law. N.J.S. 4:24-39; N.J.S. 40:55D-38, 39.

Finally, as to accessibility, petitioners have advanced their factual contentions, *supra*, disputing the Township's assessment of the remoteness of petitioners' land (*e.g.s.*, the two rail stations only two miles away; the major interstate highway coming through). Moreover, it is unlawful for a New Jersey municipality to use its zoning power to avoid its responsibility for providing appropriate roads and necessary municipal services. *Mt. Laurel, supra*, 67 N.J. at 186, 336 A.2d at 731; *Schere v. Township of Freehold*, 119 N.J. Super. 433, 436; 292 A.2d 35, 37 (App. Div. 1972). Rejecting a township's argument for minimum four-acre lot size zoning, the Supreme Court of Pennsylvania recently observed, "Zoning is a means by which a governmental body can plan for the future—it may not be used as a means to deny the future." *National Land and Investment Company v. Kohn*, 215 A.2d 597, 610 (Sup. Ct. 1965).

Hence, the Township's purposes for its zoning cannot be fairly said to be required by the public interest under the first test in *Lawton*. In addition, its zoning restrictions can hardly be found as "reasonably necessary" to accomplish the purposes involved and "not unduly oppressive upon individuals." *Lawton, supra*, at 137. Petitioners have already demonstrated how this zoning renders their property unusable and how it effectuates a drastically overbroad solution—the halting of all development—to address relatively minor construction and site development problems.

In *Pennsylvania Coal, supra*, 260 U.S. at 415, the Court observed that when the seemingly absolute protection of the Fifth Amendment is found to be qualified by the police power, "the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States." The Court then restated the general rule which governs such matters, "If regulation goes too far it will be recognized as a taking." *Id.*

Reviewing the question of whether New York City could place certain restrictions on the use of the Grand Central Terminal property pursuant to its landmark ordinance without effecting a taking, the Court has recently reiterated the applicable constitutional standards to be applied. *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). In the opening pages of its Opinion in *Penn Central*, at 107-16, the Court gave considerable attention to the significance of the public purposes involved—preserving historic accomplishments, fostering civic pride, supporting business and tourism, etc. Likewise, it emphasized the reasonableness of the city's laws in accomplishing these purposes. Such factors are noticeably absent in the instant case as aforesaid.

Again in *Penn Central*, this Court reaffirmed the continuing applicability of the principles articulated in *Goldblatt* and *Pennsylvania Coal* as discussed herein. *Id.* at 127. Accordingly, the Court considered the economic effects of

the regulations in *Penn Central* and found that all parties conceded that the terminal could yield a "reasonable return" with the limitations imposed. *Id.* at 129. It also noted that "the transferable development rights afforded appellants by virtue of the terminal's designation as a landmark are valuable." *Id.* This contrasts markedly with the case at bar where petitioners do not have the ability to realize any return under the current zoning. They have no economically viable development rights on their property; they have no transferable development rights, and they have no compensation for these losses. Their property has been locked up by these zoning provisions just as surely as if it had been subject to a physical invasion by the Township. *Richmond Elks Hall Association v. Richmond Redevelopment Agency*, 561 F.2d 1327, 1331 (9th Cir. 1977).

In short, by every measure traditionally applied to such cases by this Court, petitioners' property has been the subject of a taking without the compensation required by the Fifth Amendment. Unless this Court now acts with respect to petitioners' loss, their constitutional right will become merely a right without a remedy and they will be left without redress with respect to a very real and serious wrong.

CONCLUSION

For all of the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

BRACH, EICHLER, ROSENBERG, SILVER, BERNSTEIN and HAMMER, P.A.,
Attorneys for Petitioners

/s/ William L. Brach
WILLIAM L. BRACH

APPENDIX

OPINION AND JUDGMENT DATED FEBRUARY 5, 1979

Argued January 17, 1979—Decided February 5, 1979.

Before Judges Matthews, Kole and Milmed.

On appeal from the Superior Court, Law Division, Morris County.

Mr. William L. Brach argued the cause for appellants (Messrs. Brach, Eichler, Rosenberg & Silver, attorneys; Mr. William L. Brach and Mr. William H. Eaton on the briefs).

Mr. Lawrence K. Eismeier argued the cause for respondent Township of Montville (Messrs. Eismeier & Falcon, attorneys).

Mr. Nicholas Conover English argued the cause for respondent Committee for the Preservation of Northern Montville, Inc. (Messrs. McCarter & English, attorneys).

PER CURIAM

Plaintiffs appeal from judgments relating to the zoning ordinance, and an amendment thereto of the Township of Montville.

On July 18, 1974 the Township Committee of the Township of Montville enacted an amendment to the township zoning ordinance, rezoning approximately 2400 acres of land in the northern section of the township. The minimum lot size was increased from 45,000 square feet (approximately one acre) to 120,000 square feet (approximately three acres).

Plaintiffs instituted this action challenging the zoning amendment and seeking to have the entire zoning ordinance declared invalid due to its failure to provide for multi-family housing.

At the pretrial conference, the trial judge bifurcated the issues in the case, at the request of the township, and determined that the case would proceed first on the issue of the validity of the 1974 zoning amendment. The challenge to the entire zoning ordinance, referred to as Phase II or the *Mount Laurel* phase, was to be considered after Phase I.

Trial of the matter commenced on September 26, 1975 and continued for nineteen days, ending on November 13, 1975. On January 9, 1976, the trial judge rendered an oral opinion which invalidated certain aspects of the cluster provisions of the three-acre zoning amendment. However, he indicated that the amendment could be sustained if a more reasonable cluster alternative was enacted within 90 days. The township thereafter amended the cluster provisions.

On April 14, 1976 the trial judge heard argument on Phase II of the case. He found that the Township of Montville is a "developing municipality" as that term is used in *Mount Laurel*. He ordered the municipality to complete its master plan study and enact implementing ordinances to comply with the Mount Laurel decision by January 31, 1977.

Plaintiffs filed a notice of appeal on May 21, 1976. Since that time they have been provided with the master plan study as completed to date and a copy of the revised zoning ordinance.

We affirm the two judgments of the law division substantially for the reasons set forth by Judge Gascoyne in his two opinions. In so doing we emphasize that we will not fault the legislative judgment of the township's governing body which determines that the northern section of the township cannot sustain high density use at this time.

Affirmed.

A TRUE COPY

/s/ Elizabeth McLaughlin
Clerk

OPINION DATED JANUARY 9, 1976

BEFORE: HONORABLE JACQUES H. GASCOYNE, J.C.C. t/a

APPEARANCES:

MESSRS. BRACH, EICHLER, ROSENBERG & SILVER
By: WILLIAM L. BRACH, ESQ.,
Attorneys for the Plaintiffs

MESSRS. YOUNG & SEARS
By: LAWRENCE K. EISMEIER, ESQ.,
Attorneys for Twp. of Montville

MESSRS. McCARTER & ENGLISH
By: NICHOLAS C. ENGLISH, ESQ.,
Attorneys for Intervenor

PATRICIA BOSISIO, C.S.R.

THE COURT: Before we get into the opinion question, I think that Mrs. Vienna has been in contact with you with reference to what we thought were missing exhibits. One is actually still a missing exhibit, J-18 B. Very candidly, I don't know what happened to it. I requested that all of you be asked to go through your file to see if it's in your file. I gather that you've all complied with the Court's request and it cannot be located. I understand that Mr. English has an additional copy. Is there any objection, since all exhibits will be returned to respective counsel, if J-18B, a copy of Mr. O'Grady's report entitled Natural Environment, be marked into evidence as a joint exhibit and be substituted for the missing exhibit?

I haven't the foggiest idea what happened to it. All I can say is I think we're very, very lucky we didn't lose more in view of the number of exhibits.

(Exhibit J-18 B is marked.)

THE COURT: As far as this matter is concerned it comes on before the Court for a review of an amendment to the zoning ordinance for the Municipality of the Township of Montville. It would appear that there is no dispute that prior to the enactment of the amendment on July 18th, 1974, 2400 acres in the northern part of Montville were in the A1 or 2 zones; that on July 18th, 1974, there was an amendment to the ordinance by which these 2400 acres were placed into an A1 zone that calls for 124,000 square feet. From here on in I will refer to that as a 3 acre zone. Where I have 45,000 square feet I will refer to that as a 1 acre zone just for the purposes of simplicity.

The proofs before the Court and these are not contradicted that the plaintiffs herein, over a period of years, accumulated the various properties. Until presently the various corporations owned approximately 380 acres in the northern section of Montville. Mr. Mandelbaum, on behalf of the plaintiffs and as a principal in the various corporations, testified with respect to the difficulty in dispossessing—I should say dispossessing by way of sale these various lands. He testified that over a period of years that one of the properties was sold to the Croation Society. He also testified with respect to a 90 lot subdivision known as Mountainview Estates, which was proved by way of a preliminary subdivision in 1971. Basically, his testimony concerned efforts on behalf of the various plaintiffs to sell the properties with the argument that the Court should infer that due to the inability to sell these lands that this is a basis for inferring the unreasonableness of the zoning. Additionally, testimony was presented by way of the testimony of Mr. Jeske and Mr. Aurnhammer. Basically, their testimony involved a subdivision of what has been referred to as the Monna tract which, as I recall, is 380 acres plus. If I recall accurately it's 386 acres.

I want to hasten to point out 2 things very, very quickly. One; the purpose of this law suit was not to review a denial of a subdivision application. I further want to emphasize that the sole purpose pursuant to the Court's rulings with respect to this proposed subdivision which was to show a viable alternative. The Court should feel that the increase in the acreage by way of the zoning amendment was unreasonable. I felt that the Court should have available to it all necessary information in order to determine the reasonableness of the zoning in question. I think I would be less than candid that the fact that 2400 acres which represents, according to the testimony, 19 per cent of the land within the Municipality of Montville, putting that within a 3 acre zone, did and does disturb me. I don't want to infer that I feel that 3 acres zoning per se is unreasonable. However, I think that when you have this large quantity of acreage placed in a low density zone such as a 3 acre zone, the Court should have available to it every piece of information from which it can glean whether or not this zoning is reasonable. This is also one of the reasons that I admitted a great deal of testimony on the other side which I had my doubts about, but I feel again that testimony with reference to experience in the Lake Valhalla area by way of siltage erosion, by way of pollution, by way of testimony as to the same nature of rock formation, of soil formation, should be made available to this Court to sift and determine with respect to reasonableness. I want to emphasize that as far as this Court is concerned these 2 facets of the evidence were basically for the purposes of this opinion as it is going to turn out, for informational purposes. As far as this particular area is concerned the testimony is undisputed. That basically it is a steep slope area, there are exceptions to this. However, I am satisfied by the testimony that the slopes located generally within this area are all of a steep nature or basically of a steep nature. There are other variations. There is no question in my mind that

there are areas where slopes would not be detrimental to the development of the land. As far as this 2400 acres I am fully satisfied that basically it is on Precambrian gneiss according to the proofs before me. I am further satisfied that because of the topography herein that there is a tendency for drainage to run from north to south, from this area downward, the Lake Valhalla area towards central and southerly Montville.

I am further satisfied as a result of a review of all the testimony and I accept the testimony offered by the defendant and the defendant Intervenor and I'll refer to the defendant Intervenor as the C.P.N.M., that's the Committee for the Preservation of Northern Montville, that this area does serve as a drainage basin for the Valhalla area and further that I am satisfied that by definition that it constitutes a head water. As I understand head water area it is generally composed of smaller streams as distinguished from larger streams and forms a source of water for various areas within the environs thereof.

I am further satisfied that as far as topography is concerned there are outcroppings. I am further satisfied that there are various wetlands within this area. Further, I am satisfied by the proofs before me that as far as road accessibility is concerned this area is generally not easily accessible. I don't say it's inaccessible. I say it's not easily accessible. There is testimony before me by Mr. Abeles with reference to remoteness. As far as I'm concerned inaccessibility may be one of the considerations that go into zoning. Remoteness is not and I draw a distinction between accessibility and remoteness. The reason I draw a distinction between the two is that remoteness, in and of itself, does not mean that the area is not accessible by the various services that must be supplied by the municipality and when I say services that must be supplied I am talking

about such things as school busing, and this is not by way of limitation but just by way of illustration, school busing, police protection, fire protection, accessibility for the purposes of first aid squads and any other emergency situation. I am satisfied that the road within the area do not make this area easily accessible.

As far as water and sewage is concerned I draw a distinction between the two and the reason that I am taking these in this order are these are various factors that were offered to me by the municipality as a valid basis or valid bases for purposes of zoning. First, water. One of the considerations offered by the municipality is that there is no water presently available. It was stipulated that as between the plaintiff and the M.U.A. that there are no negotiations presently underway with respect to water. To me that is of no moment. The only important thing to me with respect to water is it's availability and I don't mean this in the sense of pollution. I'm now talking solely about supplying water for the domestic needs and the fire needs or anything of that nature. As far as the 2400 acres, in general, I'm satisfied that it is not easily accessible. As far as the plaintiff's tract is concerned I'm satisfied that it can be made accessible. So that the reason I point out the distinctions is that while this may have been a factor, a reasonable factor to take into consideration with respect to the other acreage, I feel that as far as the plaintiff's acreage there should have been a distinction, a distinction should have been drawn as far as water is concerned.

As far as the availability of a sewer system is concerned I am convinced that at this point a sewer system is not available and will not be available in the foreseeable future. The reasons that I make this statement is that I am satisfied by the proofs that as far as sewage supply is concerned and I'm talking about supplied on a municipal basis as dis-

tinguished from a private or individual basis, that despite the zoning in this particular area, this area is going very, very slowly. This is one of the reasons that I do not accept the arguments by plaintiff's counsel that the development of this area has been inhibited by the zoning therein. I do not think that this is true because I do not feel that the proofs support it. The testimony before me is to the effect that there are, if I recall correctly, 47 homes within this 2400 acre tract of land in northern Montville. This goes back to the early 1950's as far as I can recall. So that if there is any deterrents as far as development is concerned, I do not feel it has been because of municipal zoning. I feel that it has been because of the natural environment, the natural detriments as far as the land itself is concerned.

As far as the soil is concerned there is a great deal, as I've already said, that it consists of a great deal of Precambrian gneiss which is a highly impermeable soil. As I've already indicated there are outcroppings that make development, very, very difficult. I think that as long as I am talking about sewage disposal facilities, I have a lot of trouble on both sides as far as this case is concerned. I feel that septic systems and I'm satsified, and the reason for the statement is based on the proofs, I feel that septic systems in this area are very, very difficult. I am satisfied that a septic system may not constitute the best mode of sewage disposal. By the same token, with reference to this area, I am not at all convinced that the answer is with respect to a package type. I am satisfied with Mayor Eckhardt's testimony in this regard of the problems that Montville has had as far as package sewer plants are concerned. As far as the Monna tract is concerned, even though I don't feel that this is important I do mention it solely as an indication of credibility as far as Mr. Jeske is concerned, I do not feel that his proposal is a satisfactory solution either. The reason for this is that I am satisfied from the proofs

offered on behalf of the defendant Intervenor and particularly, Mrs. Connolly, the testimony supplied and the evidence supplied me by way of the natural resources inventory that, and I'll just use this as an illustration of what I'm talking about, that a stream does flow through this area where the proposed spray irrigation field is intended to be situated. Now, of course, this is my own reaction and this is one of the reasons I say when it comes to sewage disposal I have a great number of problems. I think that the governing body in Montville had good reason to be concerned. I am not convinced that the septic system is the best mode but it would seem to me, given a choice between septic system in a low density zoning, based on what is before me, may be far more reasonable than package sewer plants within the same area. Again, I emphasize the only reason for this review as far as the subdivision proposal is concerned is to illustrate some of the reasons I've reached, the conclusions that I have reached.

Testimony was also presented to me by a Mr. Aurnhammer with reference to the cost of development either on a 3 acre or by the cluster modification within the zoning ordinance. Again, I would be less than candid if I did not express a certain amount of dissatisfaction with the figures as expressed by Mr. Aurnhammer. The reason I express this dissatisfaction is, he very candidly, and I respect him for his admitting that these 2 proposals were just two of an infinite number of modes of subdivision. I am left in a quandry as to whether or not the cost of development would really be as Mr. Aurnhammer testified. I also have the testimony of Mr. John O. Lasser. I was very much impressed by his testimony because I felt that he tried to give a very fair presentation but again, it had a basic weakness in that he candidly admitted that he had to rely on some of the figures supplied by Mr. Aurnhammer. I think at this juncture it would be appropriate also

to go into the 2 planners that were offered in this case, Mr. Pete Abeles and Mr. O'Grady. I had a lot of trouble with some of the concepts as proposed by Mr. Abeles. For example, initially I was left with the impression that he was testifying that water availability and sewer disposal availability are not acceptable bases for zoning and should not be considered except in an ancillary manner, it should not be taken into consideration in zoning. Later on in cross examination he modified that. He said yes, they are principals that should be considered but they are ancillary in nature.

I feel that water and sewage disposal availability are facts to be considered along with many other factors in determining the propriety of certain zoning. Neither of these two elements are the alpha and the omega but they compose factors to be considered along with all other factors. I had a lot of trouble with Mr. Abeles' testimony in the respect that I don't think that he was truly familiar with the whole 2400 acres. He may have had some knowledge with reference to the 380 plus acres that we have been calling the Monna tract but I think that his information was limited to that. For example, he had no idea where the nearest fire department was. He had no idea where the nearest school was and I even had reason to question his accuracy or at least there was some question in my mind as to his accuracy as to how close the Monna tract was to 202, for example, what the driving time was. So that as far as Mr. Abeles' testimony is concerned I gave it little weight because as we instruct jurors, the testimony of experts are offered for your guidance. You are not bound by the expert's testimony except insofar as you feel that the premises upon which that opinion is based or premises upon which those opinions are based have a strong foundation. The opinion is no stronger than the foundation upon which it was laid and I was not satisfied

with the foundation as far as Mr. Abeles is concerned. Certain of these witnesses I'm g .g to admit such as Mrs. Winder because again, this was foundation for the offering of the proofs.

I think that as far as the environmentalists are concerned I can pretty well cover that with a broad brush but by doing so I do not mean to deprecate environmental impact. Again, I feel that this is a factor to be considered with other factors in determining zoning. I think that this is presently accepted but again, environmental impact is not the beginning and the end and one of my problems generally and again, I'm using this in a general sense, with environmentalists' testimony is that if you follow it right to the letter and to its logical conclusion, all development would cease. This just is not feasible. It is not practical, it is not reasonable. I feel that the environmental impact is a factor to be considered along with many other factors in determining the propriety of zoning, whether it should be high density or low density as indicated herein. For this reason I don't intend to spend a great deal of time with a good part of the testimony that was presented to me except for Mr. O'Grady. I think that basically I've already covered Mayor Eckhardt. His testimony was pretty much in accord with that of Mr. Genoble, a councilman on the body. Mr. Woodbridge again, was foundation as was Mrs. Kennedy's testimony. As far as Mr. Iivari is concerned he offered support to low density zoning in this area as did Mr. Miller, the State geologist. As far as Mr. Iivari is concerned I felt that when it came to spray irrigation, Mr. Jeski was way ahead of him but that is collateral to the issue before me. He testified that it should have—that based on geology that this should be on the basis of a minimum of one and a half acres. His information and his testimony was based on information gleaned from the soil maps. Mr. John Densey again testi-

fied with reference to various factors. As far as his testimony is concerned with reference to the impact from erosion, siltation, etc., while informational, as far as I'm concerned was not sufficient to show the cause of the same. However, I was satisfied with his testimony with respect to the measurements at the various posts through the areas that were set up to measure the route of water flow and to that extent I think that his testimony was beneficial. As far as Mr. Roginski is concerned, he was one of the "environmentalists" that I lumped all together as was Mr. Smith, the ecologist who testified with the impact as far as woodlands are concerned. I found this very, very interesting, very, very beneficial and I think that again, the testimony of these various environmentalists should be and I gather have been taken into consideration with respect to zoning and I emphasize, because I passed this over very, very quickly, I do not, in any sense of the word, deprecate them. Not at all because what they have to offer by way of the effect of, for example, woodlands, as far as the absorbtions of polluting gases, etc., is a factor to be considered with all other factors as far as zoning is concerned.

As far as Mr. O'Grady is concerned, part of his testimony I found very helpful, part of it not so helpful. The part that I found helpful was, in particular, the background. I'm satisfied that he is thoroughly familiar with Montville and the problems that Montville has as far as zoning is concerned. I am convinced that he is familiar and took into consideration in making his recommendations the impact that, for example, the expansion of the sewer system would have on the municipality, the expansion of the water supply system. Again, I feel that these are factors properly considered as far as zoning is concerned because if you zone for high density the municipality is required to supply these facilities and I think that in

zoning properly it's a factor to determine whether or not the expansion of such facilities will cause a financial burden upon the citizenry to the particular municipality. Again, it is a factor to be considered with all other factors.

As far as my acceptance of testimony or my findings of facts with respect to accessibility, I relied a great deal on Mr. O'Grady and I accepted his testimony in that regard. I accepted his testimony with respect to the purposes for which this was increased from a 1 acre to a 3 acre zone. I had a lot of problems as far as his testimony with respect to feasibility of development. I want to make it perfectly clear that this was a bold statement, a bold conclusionary statement and I do not accept his testimony as to the feasibility of development. As far as this zoning is concerned, and I'm going to break it down into two steps, one, the whole 2400 acres and then as far as the plaintiff is concerned, the plaintiff's 386 acres. As far as the 2400 acres is concerned, I'm satisfied that the 3 acre zoning is appropriate. I'm satisfied from the proofs that there is a great deal of land in southern and central Montville that can still be developed. A municipality is not required to develop everything at one time. This would be completely contrary to a comprehensive plan. A municipality has a right to control, to reasonably control development. In making this statement I am fully cognizant of the fact that once you have 3 acre zoning and it is developed it makes it very, very difficult to change. Not to change the undeveloped portion but to change that which has been developed. Again, under the circumstances herein, I think that the municipality had a right to take into consideration in considering this zoning the slow growth in this area. I think that this was a valid consideration as far as a comprehensive zoning plan is concerned; that expansion within southern Montville, in particular, but also including central Montville, as far as development is concerned at

this particular juncture is far more reasonable, is far more reasonable both from a land standpoint, from a municipal standpoint as far as providing services and utilities and from a landowners standpoint. I think that the municipality properly took into consideration these natural detriments as I have called them of this area because I am fully satisfied that no matter how you zone this there are large areas that are not going to be developable because of the steep slopes, because of the wetlands, because of many factors. I am satisfied that in certain areas, for example, and I'll just use this again by way of illustration, that it will be difficult, if not impossible, to get a successful percolation test for a septic system. Therefore, many, many factors that go into my conclusion that the 3 acre zoning as it presently exists is not reasonable. There was a reasonable basis upon which to zone this 3 acres, however, I do have a lot of problems with the cluster concept in this case.

What I'm about to do may seem to be a surprise to some. I feel, I find and I conclude that the cluster concept in this zoning ordinance is like carrying coals to Newcastle. It leaves the property owner with nothing and what bothers me, in particular, is that the three uses to which the land may be dedicated must be developable for all of those purposes as I read it. Now, if a landowner cannot build a house on a piece of land because of the steepness of the slope, how in the world can you expect to build a school and that bothers me. I think it has a right to bother me. The recreational purposes, I wonder about. As far as the concept is concerned, clustering is a valid concept as was recognized by Judge Furman in *Chrinko Crane Co. v. South Brunswick Twp. Planning Board,* 77 N.J. Super. 594 and in that case and this is one of the reasons I concluded and I agree with Judge Furman, he says: "The need for preserving woods and park-

lands in a natural state as well as land adequate for other public purposes is widely recognized." He then goes on to conclude that the cluster or open space zoning ordinance of South Montville Township was valid because it did comply with the purposes of zoning, that is it did go to density. So cluster zoning is a valid type of zoning. However, just like any zoning it must be reasonable and in this particular case I feel that it is not reasonable.

As far as the 2400 acres is concerned I am going to declare the zoning ordinance invalid because I feel that the cluster aspect so tied in with the 3 acre zoning and in order to give reasonable use to the property owner cluster zoning is appropriate, however, I am going to give the municipality an opportunity in which to correct what I see is a deficiency, so that if a cluster concept within the confines of this opinion can be adopted the zoning will not be invalid but will be valid. As I think I've indicated but in the event I have not, I just feel that the cluster aspect of this ordinance is not severable from the other part of the ordinance.

The municipality will have 90 days in which to develop an amended ordinance as far as the cluster is concerned. I think that I have pointed out that as far as I'm concerned and while initially I had some doubts with reference to the dedication for specific purposes contained herein, I want to say just so that there is no misconception, those doubts are no longer with me because of the *Chrinko* case and because of the *Nelson against South Brunswick Twp. Planning Board,* 84 N.J. Super. 265, an Appellate Division case cited in which Chrinko was cited with approval. Just so that you have the benefit of my erroneous thinking, I felt that the statute limited dedication of land for the purposes of school and playgrounds, etc. However, as a result of reading these two cases, I have serious doubts as

to the propriety of that thinking so that my concern is not for the purposes at this juncture but for the purpose the limitations placed upon it. Now, just again so I make it perfectly clear, I think that the governing body has a right to discretion within the planning board but not to tie them in so that there cannot be reasonable cluster development as a reasonable alternative because the affects of this ordinance was to leave the developer with no alternative. That's why I have ruled the way that I have. I think that the only way the cluster zoning can be validly enacted is if there is a reasonable alternative. That is, the purposes as set forth in *Chrinko* are complied with. I said that I would talk about this in 2 aspects because the pretrial raises it. One is an attack as far as the 2400 acres is concerned and I feel that the proofs are clearly inadequate except as what I've set forth. As far as the plaintiff's property is concerned I come to the same conclusions that I have reached as far as the general zoning is concerned, that it is reasonable provided a reasonable alternative by way of cluster zoning is enacted if, in fact, it is enacted. I feel that insofar as the plaintiff's land is concerned that it may well be for the Planning Board to decide whether or not it should be developed in accordance with the cluster zoning and I'm talking now, specifically, about water supply and sewage disposal. That I don't think you take care of by zoning.

Mr. Eismeier, may I request that you submit an appropriate order declaring that the ordinance is invalid for the reasons set forth by the Court and giving the municipality 90 days within which to amend the cluster aspect of the zoning ordinance. The Court will retain jurisdiction. Do it pursuant to the 5 day rule. Any reason why the order can't be on my desk by next Friday?

MR. EISMEIER: No, that is fine.

THE COURT: All right. Do it pursuant to the 5 day rule. If I don't have it on my desk I'll expect to see you gentlemen on January 30th at 9 A.M. Are there any questions so that we can clear it up now and not have to raise them later, Mr. Brach?

MR. BRACH: There is, of course, a second part of the trial.

THE COURT: I'm fully cognizant of that and I am not going to stay the second part of the trial. I'm going to go ahead with it as though I had not disposed of this aspect of it. My inclination, at this junction, is to go ahead with it because as we discussed off the record we're going to get into the Mount Laurel aspect and while the two are related there is enough dissimilarity between these two aspects that I feel that there's no good reason why I should stay it. Does anyone want to be heard with respect to that, Mr. Eismeier?

MR. EISMEIER: Yes, your Honor. There will be no objections raised by me to going into phase two and I would suggest that the best method to bring those before the Court would be for me to bring a motion to dismiss phase two because I would like to be heard on that. There are several legal issues and I would like to raise them.

THE COURT: I anticipated this. We'll set a trial date.

MR. BRACH: If the Court please, if there's going to be some question and I'm aware of the nature of the questions that will probably be raised from Mr. Eismeier, I would suggest to the Court that there ought to be, perhaps Mr. Eismeier can indicate how quickly those can be brought forth because there would be no real point, if the Court decides adversely to us those questions, for us to go into extensive preparation of a trial that wouldn't be forthcoming.

THE COURT: Mr. Brach, it would seem to me if I give you a trial date right here and now that the same considerations that you are arguing to me also pertain to the municipality. I'm sure the municipality doesn't want to spend money unnecessarily.

Let me put it this way; setting a trial date will act as a prod because I think you gentlemen know that when it comes to a trial date adjournments are very, very difficult to come by and if there would be a tendency to procrastinate, hopefully with a trial date that tendency will be dispelled. Do I make myself clear? In other words, what I'm suggesting to you, Mr. Brach, I don't think I have the right or the power to say, Mr. Eismeier, make your motion on such and such a date, otherwise I won't entertain it. I'm suggesting to him in as strong terms as I can that he'd better get it on because I'm not going to put it off in the event you're unsuccessful. I think the message came through loud and clear.

MR. EISMEIER: Message received.

THE COURT: March 23rd, gentlemen, 9 A.M. As a result of the off the record discussion with counsel it has been agreed that all exhibits will remain in the custody of the Court. If any counsel desires any of the exhibits they will be released to that attorney but only upon the signing of a written receipt. This is the only way we can keep track of where the exhibits are and I think it's unnecessary to say if an attorney signs out for an exhibit he will be responsible to see that that exhibit is returned.

Gentlemen, if you want exhibits please see Mrs. Vienna. I'd like to centralize it with her rather than have my law clerk or my secretary get involved.

Before we adjourn, gentlemen, I do want to say one thing to all of you. I want to thank you for the good job

you did on the briefs, for the good job that you did on your written summations. They helped me immeasurably. They made a long task so much shorter, although not a great deal shorter, but I do want to thank all of you for a job well done. It is appreciated.

We'll recess now.

ON PETITION FOR CERTIFICATION
(Filed May 1, 1979)

To Appellate Division, Superior Court:

A petition for certification having been submitted to this Court, and the Court having considered the same,

It is hereupon ORDERED that the petition for certification is denied with costs.

WITNESS, the Honorable Richard J. Hughes, Chief Justice, at Trenton, this 1st day of May, 1979.

/s/ Stephen W. Townsend
STEPHEN W. TOWNSEND
Clerk

ORDER
(Filed February 25, 1976)

This matter having come on for trial before the Honorable Jacques H. Gascoyne, in the presence of Brach, Eichler, Rosenberg & Silver, Esqs., Attorneys for the Plaintiffs, William L. Brach, Esq., appearing, and Young and Sears, Esqs., Attorneys for the Defendants Mayor and Township Committee of the Township of Montville, Lawrence K. Eismeier, Esq., appearing, and McCarter & English, Esqs., Attorneys for the Defendant-Intervenor Committee to Preserve Northern Montville, Nicholas C. English, Esq., appearing, and the Court having considered the testimony, exhibits, and the argument of counsel and being of the opinion that the provisions for three acre minimum lot size in the zoning amendment of July, 1974 are valid, that said amendment is invalid because the cluster provisions contained in said amendment are unreasonable, that the zoning amendment will be valid if the cluster provisions are corrected, and that the Township could have the opportunity to correct the deficiencies in said cluster provisions, and the Court having rendered an oral opinion which is to be incorporated herein, and the respective counsel having appeared on argument as to the form of Order, and further having appeared on the motion of Plaintiffs for reconsideration of the Order herein as to the zoning amendment as aforesaid, and the motion of the Municipal Defendant to dismiss the second phase of this action relating to comprehensive zoning and the Mt. Laurel considerations, as more particularly set forth in the Pretrial Order of the Court on the grounds that the Plaintiffs lack standing, and the Court being of the opinion that an Order should be entered as follows:

IT IS, on this 25th day of February, 1976, ORDERED and ADJUDGED, that the zoning amendment of July,

1974 is invalid because the provisions for cluster zoning contained therein are unreasonable; and it is further

ORDERED and ADJUDGED, that said ordinance amendment will be invalid if the aforesaid cluster provisions are corrected in accordance with the Court's opinion, and the Township shall have 90 days from the date hereof to amend said cluster provisions; and it is further

ORDERED and ADJUDGED that the motion of the Plaintiffs for reargument is hereby denied; and it is further

ORDERED and ADJUDGED that the motion of the Municipal Defendant for dismissal on the grounds that Plaintiffs lack standing to pursue Phase II be and the same is hereby denied; and it is further

ORDERED and ADJUDGED that to the extent that there remain issues as to the validity of the A-1 zone not disposed of herein, the Court shall reserve the right to supplement this opinion at such time as the transcript of the trial shall be available to it; by counsel and it is further

ORDERED and ADJUDGED that this shall constitute an interlocutory determination and that this matter shall proceed to final disposition on Phase II pursuant to the direction of this Court; and it is further

ORDERED and ADJUDGED that the oral opinion of the Court rendered on January 9, 1976 is incorporated in this Order as if set forth at length herein.

/s/ Jacques H. Gascoyne
JACQUES H. GASCOYNE,
J.C.C. T/A

JUDGMENT
(Filed May 10, 1976)

This matter having coming on for trial before the Court sitting without a jury on April 13, 1976 on the Second Phase of this matter as bifurcated pursuant to the Pretrial Order of this Court; and the plaintiff having proceeded on its proofs and there being represented to the Court that there would be no further proofs by the defendant controverting the allegation that the Township of Montville is a developing municipality as that term is utilized in *Southern Burlington County N.A.A.C.P., et al. v. Twp. of Mt. Laurel*, 67 N.J. 151; and

The Court having determined that by reason of the foregoing that the Township of Montville must comply with the provisions of the *Mt. Laurel* opinion and must provide for its fair share of a variety of types of housing for a region; and

The Court having further determined based upon the proofs in Phase I that the provisions of the Zoning Ordinance of the Township of Montville establishing minimum floor area requirements for single-family residential dwellings in the respective zones bear no relationship to health and safety requirements and should also be reconsidered by the Township.

It is, on this 10th day of May, 1976, ORDERED that judgment be entered in favor of the plaintiff on its Count Three; and it is further

ORDERED that this matter shall be remanded to the Township of Montville and that the Township shall complete the Master Plan Study now underway and enact implementing zoning ordinances no later than January 31, 1977, said time to be extended only upon good cause shown; and it is further

ORDERED that the Township shall consider and enact the necessary zoning to comply with the *Mt. Laurel* decision and the obligation set forth in that decision to bear the Township's fair share of varied housing in a region; and it is further

ORDERED that said zoning ordinance provisions relating to minimum floor area requirements in the residential districts, are held to be invalid since they do not bear a legitimate relationship to health and safety requirements; and it is further

ORDERED that the Court shall not retain jurisdiction over this matter; and it is further

ORDERED that the Order entered on February 25, 1976 on Phase I of this cause shall now become final; and it is further

ORDERED that the oral opinion of the Court rendered on April 14, 1976 is incorporated in this Judgment as if set forth at length herein.

/s/ Jacques H. Gascoyne
JACQUES H. GASCOYNE,
J.C.C. T/A

Supreme Court, U. S.
FILED
OCT 5 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

No. 79-500

DAVANNE REALTY COMPANY, VINMAN COMPANY, NEWARK JERSEY COMPANY, CLAYTON HOLDING COMPANY, MONNA, INC., all of the foregoing being corporations of the State of New Jersey; PHILIP MANDELBAUM and ELLA MANDELBAUM, his wife; and ROBERT GOLDBERG and DIANE GOLDBERG, his wife,

Petitioners,

vs.

MAYOR and TOWNSHIP COMMITTEE OF THE TOWNSHIP OF MONTVILLE,

Respondent,

and

COMMITTEE FOR THE PRESERVATION OF NORTHERN MONTVILLE, INC.,

Respondent-Intervenor.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

No.

DAVANNE REALTY COMPANY, VINMAN COMPANY, NEWARK JERSEY COMPANY, CLAYTON HOLDING COMPANY, MONNA, INC., all of the foregoing being corporations of the State of New Jersey; PHILIP MANDELBAUM and ELLA MANDELBAUM, his wife; and ROBERT GOLDBERG and DIANE GOLDBERG, his wife,

Petitioners,

vs.

MAYOR and TOWNSHIP COMMITTEE OF THE TOWNSHIP OF MONTVILLE,

Respondent,

and

COMMITTEE FOR THE PRESERVATION OF NORTHERN MONTVILLE, INC.,

Respondent-Intervenor

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

TO: The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States

Defendant-Respondent, Township of Montville, hereby respectfully opposes Petitioners' Petition for a Writ of Certiorari to review the Judgment of the Supreme Court of New Jersey and the Judgment of the Appellate Division of the Superior Court of New Jersey.

OPINIONS BELOW

Petitioners' statement concerning Opinions Below is adequate.

JURISDICTION

Defendant-Respondent respectfully denies that any grounds for granting the Writ has been demonstrated.

QUESTIONS PRESENTED

1. Whether any grounds for the granting of a Writ of Certiorari have been demonstrated where a state tribunal correctly upheld the validity of a zoning amendment based upon an application of clearly established zoning law to the particular facts involved and where no substantial federal question has been presented.

2. Whether any issues of the taking of property are raised where the record reveals that petitioners failed to demonstrate that the zoning restrictions rendered their lands useless and in fact conceded that their lands could be developed under the zoning amendment.

3. Whether any basis for further review has been presented in view of long-established federal and state standards of judicial review which provide that, where, as here, the record demonstrates a reasonable basis for the zoning it must be sustained by the courts.

STATEMENT IN OPPOSITION TO CERTIFICATION

The Rules of the United States Supreme Court, *Rule* 19, establish the grounds for the granting of certiorari in cases involving decisions of state courts:

> "1. Review on a Writ of Certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefore . . ."
>
> a) Where a state court has decided a Federal question of substance not theretofore determined by this Court, or has decided it in a way probably not in accord with applicable decisions of this Court."

Despite petitioners' efforts to portray this case as one of great constitutional moment, the facts of the case and the record below clearly do not satisfy any of the criteria for the granting of certiorari as set forth in the *Rule*.

As is evident from the facts and the record, this case, brought in a state court by a developer whose sole interest was economic self-interest in a high density use for his own particular tract of land, involves application of established zoning law to a particular set of facts—the reasonableness of zoning for a particular portion of a municipality that was based upon the justifications described herein.

Here, petitioners have presented nothing more than the familiar constitutional claims that resolve themselves into a normal zoning case and application of well-established zoning principles to the factual situation at hand, facts that have been reviewed at every level of the New Jersey courts. No special and important reasons have been

presented, nor has any federal question been presented, since the zoning principles applied by the New Jersey courts were those relating to the state's police power to zone, as established some fifty years ago in the *Euclid* decision.

No grounds for granting a Writ of Certiorari have been presented where the courts of New Jersey, one of the leading jurisdictions in zoning law, reasonably concluded on the record that the health, safety or general welfare would be promoted by particular zoning regulations enacted pursuant to a delegation of zoning power by state statute, and where the petitioners by their own case admitted that their lands could be developed under the zoning in question.

Defendant-Respondent, Township of Montville, hereby respectfully opposes the Petition for a Writ of Certiorari in the within captioned matter.

COUNTER-STATEMENT OF THE MATTER INVOLVED

Petitioners' Statement of Facts is in reality nothing more than another misleading, argumentative and distorted rehash of the facts, which wrongly assumes that yet another trial on the facts should take place before the United States Supreme Court. The New Jersey courts have made findings of fact based upon the evidence in determining the reasonableness of the zoning, and another trial of those facts is clearly not the purpose of a petition for certiorari.

On July 18, 1974, the Township Committee of the Township of Montville, New Jersey, enacted an amendment to the Montville Zoning Ordinance, rezoning approximately 2,400 acres of land in the area north of the Erie

Lackawanna Railroad in the northern section of Montville Township.

Plaintiffs filed a complaint on September 19, 1974 attacking the zoning amendment, which complaint also included a Count III seeking to declare the entire zoning ordinance of the municipality invalid by reason of its alleged failure to provide for multi-family housing.

At the pretrial conference in the matter, at the request of the Township, the court bifurcated the issues in the case, and determined that the case would proceed first on the issues of the validity of the zoning amendment of 1974. It further determined that the attack on the entire zoning ordinance, which came to be designated as Phase II or the *Mt. Laurel* phase (from *Southern Burlington County NAACP v. Township of Mt. Laurel*, 67 N.J. 151, 336 A.2d 913 (1975)) would be severed from the attack on the amendment of 1974, and that this phase of the case would follow Phase I if necessary.

The matter proceeded to trial on the issues of the July, 1974 amendment in the latter part of September, 1975 with the lengthy trial continuing for some weeks and not concluding until on or about November 13, 1975.

The court concluded by sustaining the three acre zoning as to the 2,400 acres. (Opinion, January 9, 1976, T17, 17-19).

The court then also sustained the 3-acre density as to plaintiffs' lands as well, except as to the cluster provisions, which the court found to be unreasonable for the reasons set forth in the opinion (T20, 10-25). The court concluded by finding that the entire amendment would be sustained, provided that a more reasonable cluster alternative is enacted (T20, 10-22). The Township amended the cluster provisions in May, 1976. No chal-

lenge was ever brought by plaintiffs to the revised cluster provisions.

On April 14, 1976 the court heard argument on Phase II of the matter. By order dated May 10, 1976 the court found that the Township was a developing municipality under the *Mt. Laurel* case and ordered the municipality to complete its master plan study then underway and enact implementing ordinances to comply with the *Mt. Laurel* decision by January 21, 1977. The order was specifically limited to a finding that the Township was a developing municipality, with the decision as to the consequences of that finding and how best to provide for a variety of housing being intentionally left to the judgment of the local legislative body.

Plaintiffs then appealed to the New Jersey Superior Court, Appellate Division, which affirmed the decision of the trial court, emphasizing that it "would not fault the legislative judgment of the Township's governing body which determines that the northern section of the Township cannot sustain high density use at this time" (Pg. 2).

Petitioner's subsequent petition for certification to the New Jersey Supreme Court was denied.

The Township enacted a comprehensive new zoning ordinance in March, 1977. The revised ordinance contains the revised cluster provisions previously enacted in May, 1976 in response to the trial court's ruling on Phase I, and maintains the three acre lot size in Northern Montville upheld by the trial court in Phase I. In response to the *Mt. Laurel* decision and the results of Phase II in this case, the new zoning ordinance also contains provision for other housing types and densities elsewhere in the municipality, and now includes provisions for multi-family housing, including two-family housing, senior citizens housing, townhouses and a P.U.R.D. Zone, with a mix of townhouses, apartments and two-family housing.

The new zoning ordinance also has never been challenged by petitioners.

This area had been zoned for one acre and two acre lots (October 16, T94, 3-14) the effect of the amendment of July, 1974 having been to rezone to an A-1 classification, and increase the pre-existing A-2 zone in Northern Montville of 45,000 sq. ft. to 120,000 sq. ft., and the lot size in the A-1 zone from 80,000 sq. ft. to 120,000 sq. ft. and combining the two so that the A-1 zone extended across the northerly portions of the Township (October 16, T101, 1-7).

There was substantially no dispute, and the trial court so found, that the re-zoned area is and the plaintiffs' lands are generally characterized by hilly topography and steep slopes, erodable soil and wetlands; is underlain by precambrian gneiss bedrock; that the soil conditions and rock outcroppings pose limitations on development; and that severe septic disposal limitations are present. Plaintiffs' lands contained areas with the same conditions and counsel for plaintiffs conceded in his opening statement that if this area is to be developed with septic tanks many of the Township's concerns are valid (September 30, T29, 1-15).

There was also no dispute that development has occurred very slowly in northern Montville, there being only 47 homes in the area, this condition occurring in the opinion of the trial court because of the natural limitations of the area. It was also not disputed that there are no public water and sanitary sewer facilities in this area of the Township, that there are no such facilities presently contemplated nor that plaintiffs do not have a contract or even

negotiations pending with the Township for such services; nor that they do not have an approved sewage treatment facility.

It was also undisputed that the Township Committee's enactment of the amendment to provide for a lower density for the area was based upon the foregoing considerations, including presentations from the defendant-intervenor CPNM, as well as that favorable reports from the Township Planning Board and Planning Consultant had been received, the Planning Consultant having broadened the initial re-zoning request to include the entire area re-zoned because of similar topography conditions and soil characteristics, and having proposed the cluster option.

The Township's determination of the need for low density zoning in this particular area of the Township was based upon a combination of zoning considerations. These factors were a) that the area is hilly and characterized by steep slopes throughout; b) that soils throughout present severe limitations for community development because of limitations on septic effluent disposal and considerable erosion potential; c) the absence of public water and sanitary sewer facilities in northern Montville; d) that the area is remote from conveniences and municipal facilities and services.

The petitioners' case at trial was largely devoted to a specific development proposal to construct a high density development on its lands. The testimony and accompanying exhibits for this proposal were objected to in their totality, and were subsequently admitted very limited purposes by the trial court (Opinion Page 5a).

Even examining the merits of the proposal it was clear that the proposal was totally lacking and nothing more than a speculative development scheme which was fraught

with problems and difficulties. Petitioners first produced an engineer to testify on this development proposal. This witness conceded on cross examination (October 1, T210, 4-19) that the site is not presently served by water, and it was further stipulated by defense counsel that the developers had no contract with the local utility for such water supply. On the question of sanitary sewer disposal, the area in question is not presently served by sewers, and this same witness conceded that the municipal sewer system is "far off from being located in close proximity to the area in question" (October 1, T146, 6-9). His presentation on his sewage disposal system the trial court found lacking (Opinion, p. 8), and he also conceded that the developer did not have an approved treatment facility from the State.

The testimony of Mr. Aurnhammer, another of plaintiffs' engineers, was also based entirely upon the assumption of facts which did not exist and without independent investigation, that is the availability of water and an approved sewage treatment plant (October 2, T44, 11-17). Again, this testimony was based on the same proposed development scheme, and was based upon only two possible subdivision layouts, notwithstanding "that the variety of layouts is virtually infinite" (October 2, T80, 13-18), this in an effort to show that the zoning created excessive construction costs. In fact, no other possible layouts were actually laid out (October 2, T79, 8-13).

This witness also described the terrain as being characterized by severe topography and thus there was general agreement with this fundamental point concerning the natural limitations of the property.

Finally, the reading of this witnesses' testimony clearly revealed that the layouts he utilized were *not* the least expensive way to develop the land (October 2, T29-

T30). In fact, he conceded on cross-examination that in making his layouts it was his "project to arrive at the maximum economic return for the developer" (October 2, T83, 14-17).

The most that this testimony showed was that the plaintiffs' development costs might (using his two particular layouts which he did not claim were the cheapest), be higher and therefore profit return lower, for the zoned development than that for plaintiffs' proposed development. This is far short of a showing that the zoning has deprived the plaintiffs of any use of its property, which was the petitioners' legal burden.

Plaintiffs' planning expert, Peter Abeles, made the same assumptions as to the availability of water and sewer. While the thrust of this witnesses' testimony was that development should be concentrated in this area, he never addressed himself to the ultimate question of the impact of his recommended density of two to three families per acre on the municipality, or the impact of the development proposal which alone would have yielded a 19% increase in the Township's population. He also made a major concession on cross-examination with reference to the subject of utilities that the trial court noted in its opinion. As the court noted, his initial testimony was that water availability and sewer availability are not an acceptable basis for zoning and should not be considered except in an ancillary manner. On cross-examination, as the trial court pointed out, he sharply modified his testimony so as to state that whether the area can be supplied with proper public utilities should have a bearing on the zoning.

Mr. Abeles further conceded that it would not make good planning sense to put 14,000 people in the A-1 Zone in northern Montville (October 6, T122, 22-25 to T123, 1-3), and then conceded that there are substantial parts of the Township lying south of the railroad that are not yet fully developed, and that a great deal of such land does not present the difficulties of terrain and soil that are present in the A-1 Zone, and that this same area is served to a degree by water and sewer facilities (October 7, T130, 4-8).

Finally, he admitted that generally it is reasonable as a matter of municipal policy to develop areas which are served or convenient to be served by sewer and water before extending water and sewer lines into new outlying areas (October 7, T130, 9-24). Thus Mr. Abeles was in accord with the Township planning consultant on this critical point.

The following witness was Mr. John Lasser, whose testimony is described in Point II herein.

Mr. O'Grady, the Township's planning consultant, testified as to the justification for the rezoning. He explained that little development had occurred in this rezoned area prior to the amendment, and using appropriate maps and documents indicated a pattern of development in the central and southern portions of the Township, the area most accessible and most served by water and sewer utilities. He also testified that the initial zoning request that came to him concerned a restricted area around Lake Valhalla and that because of similar geographic and other factors he had broadened the request and his study to include the entire area which was eventually rezoned, and that he then recommended and drew a suggested amendment and added the 1 acre cluster option (October 16, 1975, T102, 10-21). He proceeded to explain his reasons and opinions in support of the amendment which at the time of the rezoning were expressed in letter reports to the Township.

These reasons were generally set forth in four basic areas of consideration. On the first consideration of steep slopes and topography, the witness testified based on geologic and soils information supplied by the United States Department of Agriculture, Soil Conservation Service and the United States Geological Survey which was available to him at the time he studied the rezoning. His testimony, based on appropriate maps, indicated that severe slopes of 15% or more cover a very large area of the rezoned area, with many of these areas with slopes of 25% or greater (T105-T106). He then testified that as a result of the severe slopes, that a relatively low density is preferred and more desirable because of the difficulties in development and the high erosion potential (T106, 11-18). He testified that the cluster provision which he had recommended was intended to allow the development to be confined to the lands with moderate topography, with the areas of steep slope left undisturbed (T106, 19-25 to T107, 1-3).

The next consideration was that of soils, which again was based on the data referred to above, the witness giving consideration to such factors as depth to bedrock, erosion potential and drainage characteristics, particularly as these related to limitations on septic effluent disposal, erosion and drainage. The witness concluded that the area was generally characterized by considerable shallow depth to bedrock, high water table, poor soil permeability and land drainage, and high erosion potential.

On this point Mr. O'Grady referred to a map entitled "Composite Limitations" this being a composite of the factors of excessive slopes, poor soil drainage, shallow bedrock, high water table, slope permeability and high erosion potential. The conclusion was that in the A-1 zone the

above conditions were present to a substantial degree, and to a very significant degree within the severe category (T108, 25 to T109, 3). This included the fact that northern Montville is replete or almost totally categorized as having severe limitations for septic effluent disposal (T109, 21-24 to T110, 1-6). O'Grady then stated that all of these factors indicated that low density development was essential for northern Montville (T110, 1-3).

Mr. O'Grady also testified that it was his understanding, based upon the geology of this area, that is precambrian gneiss bedrock, where septic systems and private wells are to be utilized, that a lot size of 3 to 4 acres is recommended because of the limitations on ground water supply and the potential pollution hazards caused by septic tanks. His recommendation for the 3 acre lot size was then given specific expert support by the State Geologist, Joseph Miller, (who testified for the defendant-intervenor) who testified that given the geologic condition of the area, where wells and septics are to be utilized, that he recommends a 3 to 4 acre zoning density. His conclusion was based on his opinion that if houses are not properly spaced out that there is a risk of insufficient ground water supply and the pollution of wells from septic tanks.

In the third area of consideration, that of the absence of water and sewer utilities, Mr. O'Grady indicated that the rezoned area is not served by these utilities, that he did not foresee any extension of water and sewer in the area in the foreseeable future, and that he could not anticipate such an extension because of their remoteness and the high costs of the extension because of the bedrock conditions, and that therefore he had to base his planning judgment on the existing conditions and assume the use of septic and wells (T113, 25 to T114, 17). These facts also led to his recommendation of low density development in northern Montville.

This witness concluded in the final area of remoteness from municipal services, pointing out that northern Montville is not served by good road access and is remote from municipal facilities such as schools and fire stations.

This witness concluded that, notwithstanding the departure from prior zoning practice and taking all the foregoing considerations collectively, he was convinced that the increase in lot size to a 3 acre density to be a reasonable one based upon the combination of factors. He so stated that given the natural limitations of the area, and of the other considerations collectively, that he felt strongly that there must be a low density for this area of the Township and that the Township should continue to grow first in the areas served by the utilities. He also stated, that even if one were to assume the existence of an approved sewer disposal plant, that the problem of water will exist, and that even assuming the existence of both of these utilities that, while his recommendation as to the three acres lot size in particular might change, it is his opinion the need for low density in this area would *not* change (October 16, T178-T179).

When asked to comment on the proposed development of the plaintiffs', this witness indicated that this one particular proposal alone would yield a population increase of 19% of the Township overall and that such an event would cause extreme hardship to the Township.

Additional witnesses for the Township included the Mayor and one of the Township Committeemen, who testified that they had rezoned the area based upon the considerations expressed by Mr. O'Grady, including his recommendation for a three acre lot size.

The trial court, and the reviewing courts, based upon the zoning considerations demonstrated by the Township, sustained the validity of the zoning and such findings are fully supported by the evidence and applicable law.

In its opinion the trial court found as follows, noting first that it had approached the 3 acre lot size with caution, and had considered all available information in arriving at its decision (Opinion, January 9, 1976, T4-5).

1) That the testimony was basically undisputed that the area in question is a steep slope area, with exceptions (January 9, T5, 18-24); that the area was underlain with precambrian gneiss, and that because of the topography the general pattern of drainage was from north to south, from the Lake Valhalla area toward Central & Southerly Montville (January 9, T6, 1-8); that the area in question serves as a drainage basin for the Lake Valhalla area, constituting a headwater (January 9, T6, 9-21); and that the topography is characterized by outcroppings of rock and wetlands (January 9, T6, 22-24), and highly impermeable soil (January 9, T9, 21-24).

The court further concluded that these conditions make development "very, very difficult" (January 9, T9, 24-25).

2) That as far as road accessibility is concerned, the area is not easily accessible (January 9, T7, 1-20), expressly accepting the testimony of the Township planner in this regard (January 9, T17, 1-6).

3) That water is not presently available and is not easily accessible to the 2,400 acre tract, although it could be made accessible to the plaintiffs' tract (January 9, T8, 1-21).

4) That a sewer system is not available and will not be available in the foreseeable future, this conclusion being based in part upon the very slow growth being experienced in the area of the Township (January 9, T8-9).

5) That the natural limitations of the area render the use of septic systems very difficult. The Court ac-

cepted Mayor Eckhardt's testimony on the matter of the problems experienced with package plants and expressed doubt as to the proposal of the plaintiffs' engineer on package plants as a solution.

The Court concluded that, while septic system may not be the best mode, "given a choice between septic system in a low density zoning, based upon what is before me, may be far more reasonable than package sewer plants within the same area" (January 9, T11, 7-11).

6) In an extremely important finding, that any deterrents to development are because of the natural environment, *not* municipal zoning, as discussed in Point II herein.

After making these findings of fact with respect to the Township's actions on selecting a 3-acre density, the court then accepted the testimony of the Township Planning Consultant with respect to the purposes for which this area was increased from a 1-acre to a 3-acre zone (January 9, T17, 3-8). The court further was satisfied with Mr. O'Grady's thorough knowledge of the area (January 9, T16, 13-15), and that his recommendations properly took into account such factors as the impact of the expansion of the water and sewer system that would be required by high density zoning (January 9, T16, 15-25).

The court, taking into account all of the above factors as bearing on the question of reasonableness, then held the 3-acre zoning to be reasonable and appropriate from the proofs both for the 2,400 acres as well as plaintiffs' lands, subject to the cluster provisions being amended as set forth below.

The court stated that it was satisfied the municipality properly took into consideration the natural detriments of the area, and found that no matter how it is zoned "there

are large areas that are not going to be developable because of the steep slopes, because of the wetlands, because of many factors" (January 9, T18, 16-25).

It also found, based upon the proofs, that the amendment was in accordance with a comprehensive plan for the municipality, noting that a great deal of land in southern and central Montville can still be developed; that the municipality is not required to develop everything at one time, this being completely contrary to a comprehensive plan, with the municipality retaining the right to reasonably control its own development (January 9, T17-T18).

The court further found that the municipality had the right to take into consideration the slow growth in the area, and that this was a valid consideration as far as a comprehensive zoning plan is concerned, expansion within southern and central Montville being far more reasonable from both a land use standpoint and from the standpoint of providing services and utilities.

In its findings the trial court made specific reference to the credibility and weight it accorded to plaintiff's experts, expressing dissatisfaction with several of plaintiffs' key witnesses. Plaintiffs' entire case rested upon this testimony, and it is important to bear in mind the proper standards governing expert testimony, its role at the trial, and the standards of appellate review of the trial court's findings in this regard, particularly because the trial judge's determinations were largely based on his evaluation of the witnesses. The universally applied rule is that the credibility of an expert and the weight to be accorded his testimony rests in the domain of the trier of fact.

These included the engineer, Mr. Jeske, of whose testimony the trial judge stated he had a problem of credi-

bility. This also included Mr. Aurnhammer, with whose testimony the judge also expressed an amount of dissatisfaction by reason of the admission by the witness that the proposals he relied upon were just two of an infinite number of modes of subdivision. The same holds true for Mr. Lasser, whose testimony the trial judge found to be weakened in that the facts upon which it was based were those which had in turn been supplied by Mr. Aurnhammer.

The same holds true with the testimony of Mr. Abeles, the trial judge specifically pointing out the inconsistency alluded to in Mr. Abeles' testimony herein, and also the court's conclusion that the witness was not truly familiar with the entire 2,400 acres of the rezoned area, lacking, for example, knowledge as to the location of the nearest fire department and school. Thus the trial court gave little weight to Mr. Abeles' testimony, properly pointing out that such testimony is not binding upon the court, and that it was not satisfied with the foundation upon which the Abeles' opinions were based.

Petitioners also ignore the important feature of the ordinance which provides for clustering. This section was amended so as to meet the objections of the trial court, and was never at any time challenged subsequently by the petitioner herein. This provision permits lot sizes to be reduced to one acre, provided that the plan will not result in greater dwelling unit density than would result from the required lot size.

The court also expressly recognized the validity and purposes of the cluster concept and the need to preserve open space, citing *Chrinko v. So. Brunswick Tp. Planning Board*, 77 N.J. Super. 594, 600-602 (L. Div. 1963). (*N.J. S.A.* 40:55D-2, also expressly sets forth the conservation of open space as a statutory purpose of zoning.)

The basic intent of the new provisions is to achieve greater flexibility and use of the cluster option by taking into account the areas with natural limitations for development and to allow the reservation of such areas for uses which are compatible with those limitations, and which do not require construction. It is the intent of these provisions to meet the objections of the court to the previous conditions of the cluster requiring that the lands dedicated accommodate the public uses and that they be adaptable for the public uses without public expenditures because of topography, drainage or soil conditions, etc.

Petitioners' continued protestations concerning mandatory dedication and taking of lands are clearly fallacious and without merit on the face of the ordinance. Indeed, dedication was completely voluntary under the previous form of the ordinance as it is under the revision.

ARGUMENT

Point I

In instances in which a state tribunal has reasonably concluded that the health, safety or general welfare would be promoted by particular zoning and land use regulations, the United States Supreme Court has consistently upheld same even where such regulations have adversely effected recognized property interests.

It was recognized over 50 years ago by the United States Supreme Court that municipal zoning ordinances are constitutional as a valid exercise of the state's police power when reasonably related to the public health, safety, morals, or general welfare. *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

Since the decision in the *Euclid* case, the United States Supreme Court has reviewed only a very small number of zoning cases, normally those arising in the federal courts, and when the Court has acted in this field it has been to reaffirm and expand the principles set forth in that decision. *Berman v. Parker*, 348 U.S. 26 (1954).

This is also evident in several very recent decisions of the Court. In the case of *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), the court expanded the *Euclid* decision:

> "A quiet place where yards are wide, people few and motor vehicles restricted are legitimate guidelines in a land use project addressed to family needs. This goal is a permissible one within *Berman v. Parker, supra.* The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones for family values, youth values, and the blessings of quiet seclusion and clear air make the area a sanctuary for people."

In that case an ordinance restricting land use to one family dwellings was upheld as meeting constitutional standards and as valid land use legislation.

In *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962), the Supreme Court again reaffirmed the principles of these earlier decisions, upholding a town ordinance banning excavations below the water table which effectively precluded the property owner from continuing a sand and gravel excavating business. The Supreme Court found there was no taking because the restrictions served a substantial public purpose, and that merely depriving the most beneficial use is not sufficient to show a taking.

In the very recent case of *Penn Central Transportation Corp., et al., v. City of New York*, 438 U.S. 104 (1978), the Supreme Court upheld New York City's Landmarks Law. Once again, restrictions that were substantially related to the protection of the general welfare were held not to constitute a taking and to be constitutionally valid.

In this case, the Supreme Court took occasion to restate the criteria concerning its view of state zoning decisions.

> ". . . in instances in which a state tribunal reasonably concluded that "the health, safety, morals or general welfare would be promoted by prohibiting particular contemplated uses of land, this Court has upheld land use regulations destroyed or adversely affected recognized property interests. *Nectow v. Cambridge*, 277 U.S. 183 (1928). Zoning laws, of course, are the classic example—*Euclid v. Ambler Realty*, 272 U.S. 365 (1926) (prohibition of industrial use); *Gorieb v. Fox*, 274 U.S. 603, 608 (1927) (requirement that portions of parcels be left unbuilt); *Welsh v. Swasey*, 214 U.S. 91 (1909) (height restric-

> tion), which have been viewed as permissible governmental action even when prohibiting the most beneficial use of the property."

In New Jersey, as in other jurisdictions, land use regulation has been expressly encompassed within the state's police power, the New Jersey Constitution having expressly so provided by an amendment in 1927. That amendment also authorized legislative delegation of the power to municipalities. Art. IV, Sec. VI, Para. 2, New Jersey Constitution, 1947. The legislative delegation of the zoning power is now found in the zoning enabling act, *N.J.S.A.* 40:55-30 to 51.

Over the years, the New Jersey Courts have reviewed challenges to zoning regulations under state standards in accordance with the same standards as found in the *Euclid* decision. *Mt. Laurel, supra,* at 174-75.

This particular case is a classic example of the state tribunal having reasonably concluded that the zoning enactment under consideration is valid, following a full challenge at every level of the court system. The record, as discussed herein, amply justified such a conclusion.

In addition to the obvious fact that plaintiffs have had a thorough and exhaustive challenge to the ordinance in accordance with the *Euclid* principles, it is also important to bear in mind that the decision of the state trial court was based in large part upon specific factual findings, including its findings as to the credibility and weight of expert testimony. Such determinations, when supported by adequate evidence and resting largely upon the application of specific facts to the established principles of zoning law, should not be lightly disturbed on appeal under well

recognized appellate standards of both state and federal courts.

It must also be kept in mind that this action was a challenge to a zoning ordinance under the landmark *Mt. Laurel* case, one of the leading exclusionary zoning cases in the nation. In that case, the New Jersey Supreme Court, a court which has held that the requirements of the State constitution may be more demanding than those of the federal constitution, held that every developing municipality in the state has the presumptive obligation affirmatively to plan and provide by its land use regulations for the reasonable opportunity for an appropriate variety and choice of housing, including low and moderate cost housing. The Montville Township zoning ordinance has been challenged against the rigorous requirements of the *Mt. Laurel* case, the New Jersey Supreme Court having found the zoning to be valid by reason of its denial of certification.

In short, plaintiffs' case has been exhaustively tried and been rejected at every level of the New Jersey court system. The United States Supreme Court has refused to review or disturb such judgments. *See Mt. Laurel, supra, appeal dismissed* 423 U.S. 808; *Lionshead Lake, Inc. v. Township of Wayne,* 10 N.J. 165 (1952), *appeal dismissed* 344 U.S. 919, 73 S. Ct. 386, 97 L.Ed. 708 (1953) (approving requirement of minimum floor area for dwellings, the same in all residential districts); *Vickers v. Township Committee of Gloucester Township,* 37 N.J. 232 (1962), *cert. den.* 371 U.S. 233, 83 S. Ct. 326, 9 L.Ed.2d 495 (1963) (sustaining ordinance provisions prohibiting mobile home parks throughout the township).

Here, there can be no question that the record amply justifies the result reached by the New Jersey courts.

Point II

No issues of the taking of property are raised where the record reveals that petitioners failed to demonstrate that the zoning restrictions rendered their lands useless, and in fact conceded that their lands could be developed under the zoning amendment.

The contention that plaintiffs have been deprived of all use of their lands is completely false. In fact, plaintiffs' very own expert real estate witness conceded this point in his testimony.

What was particularly noteworthy of Mr. Lasser's conclusions were his use of the term "limited" and "upper fringe of the market" (October 15, T24, 3-5) when referring to the type of housing permitted by the zoning amendment at issue. This point was also clearly conceded by the witness on cross-examination by the Township:

> "Q. Using your own words, you said that the market you're talking about is the fringe or the upper reaches. My question to you is: Are you saying that or that there is absolutely no market for this type of housing? Which is it?
>
> A. No. My testimony was that there was a market however small, a very minor market, which I estimated to be from one to 15 house per year in Montville over the entire town, and I referred back to experience in the town itself as a basis for that" (October 15, T56, 5-13).

The witness also clearly indicated that (even assuming arguendo that the costs he relied upon were accurate) the market for the $80,000 or more homes (which he claimed would result under the zoning ordinance) was small and

stable and not affected by local and national economic conditions (October 15, T55, 8-23).

The main objection expressed by this witness seemed to relate primarily to the "front end" costs allegedly incurred by the developer under the zoning (October 15, T24, T3-12; T30, 3-10). This of course is nothing more than argument based on a developer's most preferred method to finance his developments and achieve his highest profit expectations, not evidence of confiscation by zoning.

This witness also conceded that at least some of the land could be used which fronted along the existing streets, which again goes to a showing not of confiscation, but of loss of a more profitable use (October 15, T63, 4-25 to T64, 1-4).

A "limited" market does not mean no market, and thus in and of itself the testimony of this witness failed to prove that the plaintiff has been deprived of any reasonable use of his property by this zoning.

This witness also acknowledged that the pace of development of northern Montville has been "extremely slow paced" and that this had nothing to do with the July, 1974 zoning amendment (October 15, T56, 23-25 to T57, 1-25). When asked as to why this slow growth might have occurred, he was of the opinion that the more attractive land and the more developable land was developing first in the Township.

He also testified that such lands might develop first by reason of their being easier lands to develop, and the availability of roads, water and sewer services (October 15, T59, 17-25 to T60, 1-17). This is precisely one of the points that the Township stressed, that development has

in fact and also should as a matter of sound planning take place first in those areas of the Township which have the facilities to support it.

For the petitioners to assert that a taking has occurred, or that the Township has "stopped development" is absurd in view of this testimony from their very own witness.

The trial court made an important finding on this point, which is that any deterrents to development are created because of the natural environment, *not* municipal zoning:

> "This is one of the reasons that I do not accept the arguments by plaintiff's counsel that the development of this area has been inhibited by the zoning therein. I do not think that this is true because I do not feel that the proofs support it. The testimony before me is to the effect that there are, if I recall correctly, 47 homes within this 2400 acre tract of land in northern Montville. This goes back to the early 1950's as far as I can recall. So that if there is any deterrents as far as development is concerned, I do not feel it has been because of municipal zoning. I feel that it has been because of the natural environment, the natural detriments as far as the land itself is concerned (January 9, T9, 7-24)."

In view of the record on this question, petitioners' assertions concerning a taking are completely false. The most that might have been shown is that petitioners might have been deprived of a more profitable use of their lands, a showing which is clearly insufficient. *City of East Lake v. Forest City Enterprises, Inc.*, 428 U.S. 668, 674, Note 8; *Goldblatt v. Town of Hempstead*, 369 U.S. 590.

Point III

Under long-established federal and state standards of judicial review, where, as here, the record demonstrates a reasonable basis for the zoning it must be sustained by the courts.

The proper scope of judicial review is a fundamental point in a consideration of any zoning case. The Supreme Court as well as the New Jersey courts have always recognized that zoning is a municipal legislative function that is beyond intervention by the courts unless clearly arbitrary or unreasonable. *Euclid v. Ambler Realty, supra,* at page 388; *Berman v. Parker, supra,* at 32-33.

The standard of judicial review was well-summarized in a recent New Jersey Supreme Court decision:

> It is fundamental that zoning is a municipal legislative function beyond the purview of interference by the courts unless an ordinance is seen in whole or in application to any particular property to be clearly arbitrary, capricious or unreasonable, or plainly contrary to fundamental principles of zoning or the statute, *N.J.S.A.* 40:55-31, 32. It is commonplace in municipal planning and zoning that there is frequently, and certainly here, a variety of possible zoning plans, districts, boundaries, and use restriction classifications, any of which would represent a defensible exercise of the municipal legislative judgment. It is not the function of the court to rewrite or annul a particular zoning scheme duly adopted by a governing body merely because the court would have done it differently or because the preponderance of the weight of the expert testimony adduced at a trial is at variance with the local legislative judgment. If the latter is at lease debatable it is to be sustained (at 343).

Bow & Arrow Manor v. West Orange, 63 N.J. 335, 343 (1973).

In addition to the foregoing findings of fact and conclusions, much of which were based upon matters involving credibility and weight given to expert testimony and therefore not lightly disturbed upon appeal, the trial court's legal conclusions, as affirmed on appeal, on reasonableness and compliance with a comprehensive plan are fully supported by the record and decisional law.

On the question of the municipality's unquestionable right to control population density by zoning, Montville's efforts to cope with potential crowding, congestion and inability to provide public facilities in this area clearly constitute a sound basis for the rezoning and a reasonable exercise of the zoning power, as the court found. New Jersey Municipal Land Use Law, *N.J.S.A.* 40:55D-2(e); *Euclid v. Ambler Realty, supra; Berman v. Parker, supra; Village of Belle Terre, supra; Mountcrest Est., Inc. v. Rockaway Mayor and Tp. Com.*, 96 N.J. Super. 149, 155 (App. Div. 1967); *Clary v. Borough of Eatontown*, 41 N.J. Super. 47 (App. Div. 1956).

Similarly, the trial court's consideration of the effect of the amendment with reference not simply to petitioners' development proposals, but, as Mr. O'Grady did, with reference to entire area rezoned and the Township as a whole, was completely correct. *Fischer v. Township of Bedminster*, 11 N.J. 194, 206 (1952), *Bow & Arrow Manor v. Town of West Orange, supra.* The failure to do this was a critical defect in plaintiffs' case.

Nor is there any authority in any case cited by petitioners for the proposition that every portion of the municipality is suited and must zone for high density uses. In fact the New Jersey Supreme Court expressly recognized to the contrary at 67 N.J. at 187:

> "This is not to say that land use regulations should not take due account of ecological or environmental factors or problems. Quite the contrary. Their importance, at last being recognized, should always be considered." *So. Burl. Cty. N.A.A.C.P. v. Tp. of Mt. Laurel*, 67 N.J. 151, 187 (S. Ct. 1975).

Clearly this recognition applies not only to environmental considerations, but to such other zoning considerations as availability of sewers, accessibility, services, and all of the various factors which the trial Court recognized in sustaining the three acre zoning.

Thus it is clearly consistent with established zoning law and the principles of a comprehensive plan to have large lot, low density zoning in an area of the municipality where, as here, the facts warrant such zoning, and allowing other density levels and types of housing elsewhere in the municipality where they can be properly accommodated, as the Township did in the enactment of its revised comprehensive zoning ordinance. *Euclid, supra.; Berman, supra; Belle Terre, supra; Mt. Laurel, supra.*

It is also consistent with the New Jersey Municipal Land Use Law, which sets forth the promotion of appropriate population densities as one of the statutory purposes of zoning. *N.J.S.A.* 40:35D-2(e).

Nor can there be the slightest doubt as to the right, and indeed the obligation, of the municipality to take into account the natural limitations of the land in determining proper zoning, again as the trial court found; nor that such considerations in the zoning process do not give rise to any issues of taking because of the substantial public purpose of preventing harm. *Goldblatt v. Town of Hempstead, supra.*

Additionally, the New Jersey Municipal Land Use Law contains a clear legislative directive to consider the natural environment when enacting appropriate zoning. *N.J.S.A.* 40:55D-2; 55D-28(2).

These authorities leave no doubt as to the need to consider the natural environment and also that the landowner has no absolute right to develop his land in a manner for which it is inherently unsuited.

In particular, on the question of zoning to take into account terrain and the likelihood of septic disposal problems, a specific issue here, see *Salamar Builders Corp. v. Tuttle*, 29 N.Y.2d 221, 275 N.E.2d 585, 325 N.Y.S.2d 933 (C. of A. 1971); *Nattin Realty, Inc. v. Ludewig*, 67 Misc. 2d 828, N.Y.S.2d 668 (S. Ct. 1971); *Steel Hill Development, Inc. v. Town of Sanbornton*, 388 F. Supp. 301 (D.C. N.H. 1972); *aff'd* 469 F.2d 956 (1st Cir. 1972).

The need to consider the availability of utilities is also a basic purpose of zoning. *Mountcrest Estates v. Rockaway, supra; Mt. Laurel, supra; N.J.S.A.* 40:55D-28(5)(6). The same holds true for accessibility and traffic *N.J.S.A.* 40:55D-28(5), and community facilities *N.J.S.A.* 40:55D-28(6).

As to the argument that these considerations are properly left to site plan and subdivision review, the Township submits that this is totally contrary to good planning practice. First, based upon the evidence in this case there is no evidence sufficient to overcome the Township's judgment that this area is not sewered and may not be sewered for a long time and will have to develop with septic tanks, and that there is a danger of improper operation and pollution from the plaintiffs' proposed system, which has not even been approved by the State.

Second, even if such an approved facility is to be assumed, then the question still remains as to how the availability of water can be assumed, there being no dispute that the property is not presently served by a water line, which is not contemplated at this time and which may not be built

in the foreseeable future, if ever. The plaintiffs also failed to introduce any proofs as to the sufficiency of the present onsite water supplies to sustain its proposed density, there being no municipal water in the area and no immediate prospect of there being any, and no proofs that plaintiffs could obtain water from the municipality, that even negotiations are pending, or that the municipality has the resources to provide water or that it would be willing to extend the system.

The assumption of water and sewer assumes away the critical issues in the case, and while easily made by the individual owner, they are assumptions in which the Township simply cannot indulge in determining the proper density for 2,400 acres, or some 19% of the land area of the Township of Montville. If, as in fact the evidence has shown, the area does lack the essential facilities of sewer and water and does contain severe natural limitations, including septic disposal and water supply, the Township submits that the time to take these factors into account is now, and not be confronted later with subdivision, site plan and building applications for an area which simply cannot sustain the population sought by plaintiffs on its tract (let alone for the remaining area of the A-1 zone) and could not provide the necessary services which the plaintiffs are so willing to assume away in this case. A policy of permitting high density land use in an area known to be incapable of supporting it is contrary to every concept of proper planning and zoning.

Thirdly, even if the existence of both of these facilities is assumed, there is no evidence sufficient to overcome the Township's judgment that this area must develop on a low density basis given the combination stressed by Mr. O'Grady of its natural limitations, the absence of utilities and remoteness from municipal services.

Sound principles of planning and zoning demand that the Township consider, as it did, the ability of the land to support development and of the impact of development on other areas.

The evidence was clear, and the Township's judgment therefore reasonable, that severe limitations are presented for development: the topography and soil conditions are such as to create the likelihood of drainage and erosion problems, inhibit the installation of municipal water and sewer facilities, and the installation of a properly functioning package plant; that therefore the area would necessarily be limited to the use of wells and septic tanks based upon these conditions; that the geologic nature of the area limits ground water supply and creates the likelihood of pollution of wells from septic systems, with the State Geologist recommending a 3-4 acre lot size; that high density development must be serviced by municipal water and sewer; that the area is remote from municipal utilities and services; that the Township should develop first in those areas served by sewer and water; that the 3-acre lot size with the 1-acre cluster was the most appropriate and reasonable way to achieve the necessary density and at the same time allow for concentration of development in the most developable areas.

In sum, the record clearly reveals that the plaintiffs' property has been zoned as part of a comprehensive plan for the entire Township, intended to accommodate growth in those areas able to support it consistent with the purposes of sound planning. The proofs also reveal that the property in question can be utilized and is not confiscatory. It is not the municipality's obligation to maximize the potential profit to a landowner. It is not enough to demonstrate that property can command greater sales value by permitting increased density, and an owner is not entitled to have his property zoned for its most profitable use. The

petitioners, as all courts below have found, have failed to overcome the presumption of validity of the ordinance, and carry their heavy burden, which is to prove that the municipality's actions are clearly arbitrary, capricious, and unreasonable and bear no substantial relation to the public health safety convenience, and welfare. *Burns v. City of DesPeres,* 534 F.2d 103, *certiorari denied* 429 U.S. 861. Even if a debatable question had been presented, local legislative judgment prevails.

We are dealing with a local legislative determination that the area in which plaintiffs' particular lands are located are not suited for high density development, and that lands elsewhere in the municipality are better suited for such uses. The three acre lot size is hardly unique, and is fully supported by the evidence and by all recent New Jersey Supreme Court pronouncements on the question. *Oakwood at Madison, Inc. v. Township of Madison,* 72 N.J. 481, 505, Note 9.

Such zoning is envisioned by and supported by well-established zoning law, both on the merits of such zoning as well as the proper standards of judicial review and the reluctance to interfere with local legislative judgments where a reasonable basis for the zoning exists, as it did here.

CONCLUSION

Therefore, the Respondent, Township of Montville, respectfully submits that the evidence in the case and the controlling law warrant the opinions and judgments entered by the courts of the State of New Jersey, that same should be affirmed in all respects, and that no grounds for granting the Writ have been demonstrated.

Respectfully submitted,

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